

(23,162)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 231.

HUGO ADELBERTO THOMSEN, GUSTAVE A. FEDDERSON,
HENDRICH JOHANNES RIEDEL, AND EDWARD H. MUL-
LER, COMPOSING THE FIRM OF THOMSEN & COM-
PANY, PLAINTIFF IN ERROR,

vs.

SIR CHARLES W. CAYSER, CHARLES W. CAYSER, JR.,
AUGUST B. T. CAYSER, ET AL., COMPOSING THE FIRM
OF CAYSER, IRVINE & COMPANY, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.
THE UNION CASTLE MAIL STEAMSHIP COMPANY, LTD., et al., Plain-
tiffs in Error (Defendants Below),

vs.

HUGO ADELBERTO THOMSEN et al., Defendants in Error (Plaintiffs
Below).

Transcript of Record.

Error to the Circuit Court of the United States for the Southern Dis-
trict of New York.

Printed under the Direction of the Clerk.

1 United States Circuit Court, Southern District of New York.

HUGO ADELBERTO THOMSEN, GUSTAV A. FEDDERSON, HEINRICH
Johannes Riedel, and Edward H. Muller, Composing the Firm of
Thomsen & Co., Plaintiffs,

against

UNION CASTLE MAIL STEAMSHIP COMPANY, LIMITED; SIR CHARLES
W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur
E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T.
Portlock, and John Percival, Composing the Firm of Cayser, Irvine
& Co.; Bucknall Steamship Lines, Limited; Sir Donald Currie,
Sir Francis Henry Evans, David Martin Currie, Frederick James
Mirrielees, George Alexander Keith Wisely, Percy Alport Mol-
teno, Alastair Currie, John MacMartin Currie, and Murland De
Grasse Evans, Composing the Firm of Donald Currie & Company;
Herbert Barber and James Barber, Composing the Firm of Bar-
ber & Co.; Edward N. Norton and Skeffington S. Norton, Com-
posing the Firm of Norton & Son, Defendants.

Petition for a Writ of Error.

To the Honorable the Judges of the Circuit Court of the United States
for the Southern District of New York:

2 The defendants, Sir Charles W. Cayser, Charles W. Cayser,
Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R.
Cayser, Hugh Gibb, John Joss, G. T. Portlock and John
Percival, composing the firm of Cayser, Irvine & Co.; Herbert Barber
and James Barber, composing the firm of Barber & Co.; Edward N.
Norton and Skeffington S. Norton, composing the firm of Norton
& Son, being the only parties defendant in the above-entitled cause
against whom judgment was entered herein on the 28th day of
April, 1909, as fully appears in the said judgment, considering
themselves aggrieved by the verdict of the jury and the said judg-

ment, now come by Convers & Kirlin, their attorneys, and petition this Honorable Court that a writ of error may issue in their behalf out of the United States Circuit Court of Appeals for the Second Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals; and they further pray that upon the filing of a supersedeas bond in the sum of \$30,000.00, to be approved by one of the Judges of this Court, execution of the judgment entered herein on the 28th day of April, 1909, be suspended and stayed until the determination of the said writ of error by the United States Circuit Court of Appeals for the Second Circuit.

And your petitioners will ever pray, etc.

CONVERS & KIRLIN,
Attorneys for Defendants.

27 William Street, Borough of Manhattan, City of New York.
New York June 25, 1909.

- 3 At a Stated Term of the United States Circuit Court for the Southern District of New York, held at the Court Rooms thereof, in the Federal Building, in the County of New York, on the 6th day of July, 1909.

Present: Hon. E. Henry Lacombe, Circuit Judge.

HUGO ADELBERTO THOMSEN, GUSTAV A. FEDDERSON, HEINRICH Johannes Riedel, and Edward H. Muller, Composing the Firm of Thomsen & Co., Plaintiffs,

against

UNION CASTLE MAIL STEAMSHIP COMPANY, LIMITED; SIR CHARLES W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock, and John Percival, Composing the Firm of Cayser, Irvine & Co.; Bucknall Steamship Lines, Limited; Sir Donald Currie, Sir Francis Henry Evans, David Martin Currie, Frederick James Mirrielees, George Alexander Keith Wisely, Percy Alport Molteno, Alastair Currie, John MacMartin Currie, and Murland De Grasse Evans, Composing the Firm of Donald Currie & Company; Herbert Barber and James Barber, Composing the Firm of Barber & Co.; Edward N. Norton and Skeffington S. Norton, Composing the Firm of Norton & Son, Defendants.

Order Allowing Writ of Error.

On reading and filing the foregoing petition for a writ of error, and on motion of Convers & Kirlin, attorneys for the defendants, it is hereby

- 4 Ordered that a writ of error be and it hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit the judgment heretofore entered herein on

the 28th day of April, 1909, and that the amount of bond on said writ of error be and it hereby is fixed at \$30,000.00; and upon filing said bond it is further

Ordered that all further proceedings upon the part of the plaintiffs herein for the enforcement of said judgment be suspended and stayed until the final determination of the United States Circuit Court of Appeals for the Second Circuit upon the writ of error herein granted.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States Circuit Court, Southern District of New York.—Hugo Adelberto Thomsen et al., Plaintiffs, against Union Castle Mail Steamship Co., Ltd., et al., Defendants.—Petition for writ of Error and Order Allowing Same.—Convers & Kirlin, Attorneys for Defendants, 27 William St. New York, N. Y.—Copy received Jul- 10, 1909.—Ullo, Ruebsamen & Yuzzolino.—U. S. Circuit Court, Southern District, N. Y.—Filed Jul- 13, 1909.—John A. Shields, Clerk.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before
5 you, or some of you, between Hugo Adelberto Thomsen, Gustav A. Feddersen, Heinrich Johannes Riedel and Edward H. Muller, composing the firm of Thomsen & Co., Plaintiffs, and Union-Castle Mail Steamship Co, Ltd., Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock and John Percival, composing the firm of Cayser, Irvine & Co.; Bucknall Steamship Lines, Ltd., Sir Donald Currie, Sir Francis Henry Evans, David Martin Currie, Frederick James Mirrielees, George Alexander Keith Wisely, Percy Apport Molteno, Alastair Currie, John MacMartin Currie and Murland De Grasse Evans, composing the firm of Donald, Currie & Co.; Herbert Barber and James Barber, composing the firm of Barber & Co.; Edward N. Norton and Skeffington S. Norton, composing the firm of Norton & Son, defendants, a manifest error hath happened to the great damage of the said defendants as is said and appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before

the Judges aforesaid, on the 30th day of July, 1909, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit, may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

6 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this sixth day of July, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-fourth.

[SEAL.]

JOHN A. SHIELDS,
*Clerk of the Circuit Court of the United States of
America for the Southern District of New York,
in the Second Circuit.*

The foregoing writ is hereby allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the pages numbered from 1 to 424, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Union Castle Mail Steamship Company, Ltd., and others, Plaintiffs in Error, against Hugo Adelberto Thomsen and others, Defendants in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 2nd day of December, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-fourth.

[SEAL.]

JOHN A. SHIELDS, *Clerk.*

7 (Endorsed:) The U. S. Circuit Court of Appeals for the Second Circuit.—Sir Charles W. Cayser, Chas. W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock and John Percival, composing the firm of Cayser, Irvine & Co.; Herbert Barber & James Barber, composing the firm of Barber & Co.; Edward N. Norton & Skeffington S. Norton, composing the firm of Norton & Son, Plaintiffs in Error, vs. Hugo Adelberto Thomsen, Gustav A. Feddersen, Heinrich Johannes Riedel & Edward H. Muller, composing the firm of Thomsen & Co., Defendants in Error.—Writ of Error.—Convers & Kirlin, Attorneys for Plaintiffs in Error.—Copy received Jul- 10, 1909.—

Ullo, Ruebsamen & Yuzzolin, Attorneys for Defendants in Error.—
U. S. Circuit Court, Southern District, N. Y. Filed Jul-13, 1909.—
John A. Shields, Clerk.

8 United States Circuit Court, Southern District of New York.

HUGO ADELBERTO THOMSEN, GUSTAV A. FEDDERSON, HEINRICH
Johannes Riedel, and Edward H. Muller, Composing the Firm of
Thomsen & Co., Plaintiffs,

against

UNION-CASTLE MAIL STEAMSHIP COMPANY, LIMITED; SIR CHARLES
W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur
E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T.
Portlock, and John Percival, Composing the Firm of Cayser, Irvine
& Co.; Bucknall Steamship Lines, Limited; Sir Donald Currie,
Sir Francis Henry Evans, David Martin Currie, Frederick James
Mirrielees, George Alexander Keith Wisely, Percy Alport Mol-
teno, Alastair Currie, John MacMartin Currie and Murland De
Grasse Evans, Composing the Firm of Donald Currie & Company;
Deutsche Dampfschiffahrts Gesellschaft, Hansa; Herbert Barber
and James Barber, Composing the Firm of Barber & Co.; Edward
N. Norton and Skeffington S. Norton, Composing the Firm of
Norton & Son; Henry W. O. Edye, William Volckens, Paul Got-
theil, and William L. Walther, Composing the Firm of Funch,
Edye & Co., Defendants.

To the above-named Defendants:

9 You are hereby summoned to answer the complaint in this
action and to serve a copy of your answer on the plaintiffs'
attorneys within twenty days after the service of this sum-
mons, exclusive of the day of service; and in case of your failure to
appear, or answer, judgment will be taken against you by default
for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the
United States, at the Borough of Manhattan, in the City of New
York, this 10th day of June, in the year one thousand nine hundred
and three.

[SEAL.]

JOHN A. SHIELDS, *Clerk.*

ULLO & RUEBSAMEN,
Plaintiffs' Attorneys.

Office and Post Office address, No. 11 Broadway, Borough of Man-
hattan, New York City.

10 Circuit Court of the United States, Southern District of New York, Second Circuit.

HUGO ADELBERTO THOMSEN, GUSTAV A. FEDDERSON, HEINRICH Johannes Riedel, and Edward H. Muller, Composing the Firm of Thomsen & Co., Plaintiffs,

against

UNION-CASTLE MAIL STEAMSHIP COMPANY, LIMITED; SIR CHARLES W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock, and John Percival, Composing the Firm of Cayser, Irvine & Co.; Bucknall Steamship Lines, Limited; Sir Donald Currie, Sir Francis Henry Evans, David Martin Currie, Frederick James Mirrielees, George Alexander Keith Wisely, Percy Alport Molteno, Alastair Currie, John MacMartin Currie and Murland De Grasse Evans, Composing the Firm of Donald Currie & Company; Deutsche Dampfschiffahrts Gesellschaft, Hansa; Herbert Barber and James Barber, Composing the Firm of Barber & Co.; Edward N. Norton and Skeffington S. Norton, Composing the Firm of Norton & Son; Henry W. O. Edye, William Volckens, Paul Gottheil, and William L. Walther, Composing the Firm of Funch, Edye & Co., Defendants.

The plaintiffs, complaining of the defendants, respectfully show to this Honorable Court:

11 First. That at all times hereinafter mentioned the complainants were and still are merchants and copartners, doing business as such in the City of New York, under the firm name of Thomsen & Co., and engaged in trade and commerce between the ports of New York and South African ports and other ports.

Second. On information and belief, that at all times hereinafter mentioned the defendant "Union Castle Mail Steamship Company, Limited," was and still is a foreign corporation, doing business as common carriers of merchandise, among others, between the ports of New York and South African ports, and duly organized and existing under the laws of the Kingdom of Great Britain and Ireland.

Third. On information and belief, that at all the times hereinafter mentioned, the defendants Sir Charles W. Cayser, Charles W. Cayser, Jr.; August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock and John Percival were and still are copartners, doing business as common carriers of merchandise, among others, between the port of New York and South African ports, under the firm name of Cayser, Irvine & Co.

Fourth. On information and belief, that at all the times hereinafter mentioned the defendant "Bucknall Steamship Lines, Limited," was and still is a foreign corporation, doing business as common carriers of merchandise, among others, between the port of New York and South African ports, and duly organized and existing under the laws of the Kingdom of Great Britain and Ireland.

Fifth. On information and belief, that at all the times hereinafter mentioned the defendants Sir Donald Currie, Sir Francis
12 Henry Evans, David Martin Currie, Frederick James Merrielee, George Alexander Keith Wisely, Percy Alport Molteno, Alastair Currie, John Macmartin Currie and Murland De-grasse Evans were and still are copartners, doing business as common carriers of merchandise, among others, between the port of New York and South African ports, under the firm name of Donald Currie & Co.

Sixth. On information and belief, that at all the times hereinafter mentioned the defendant Deutsche Dampschiffahrts Gesellschaft, Hansa, was and still is a foreign corporation, doing business as common carriers of merchandise, among others, between the port of New York and South African ports, and duly organized and existing under the laws of the Empire of Germany, and also does business under the name or style of the Hansa Steam Navigation Company of Bremen.

Seventh. On information and belief, that at all the times hereinafter mentioned the defendants Herbert Barber and James Barber were and still are copartners, doing business under the firm name of Barber & Company, and as such were and still are the agents at this port of New York for the defendant "Union Castle Mail Steamship Company, Limited," for the defendant firm of "Cayser Irvine & Co."

Eighth. On information and belief, that at all the times hereinafter mentioned the defendants Edward N. Norton and Skeffington S. Norton were and still are copartners, doing business under the firm name of Norton & Son, and as such were and still are the agents at this port of New York for the defendant "Bucknall Steamship Lines, Limited," and for the defendant firm of Donald Currie & Co.

13 Ninth. On information and belief, that at all the times hereinafter mentioned the defendants Henry W. O. Edye, William Volckens, Paul Gottheil and William L. Walther were and still are copartners, doing business under the firm name of Funch, Edye & Co., and as such were and still are the agents at this port of New York for the defendant Deutsche Dampschiffahrts Gesellschaft, Hansa.

Tenth. On information and belief, that at all the times hereinafter mentioned the defendant Union Castle Mail Steamship Company, Limited, the defendants, composing the firm of Cayser, Irvine & Company; the defendant, Bucknall Steamship Lines, Limited; the defendants, composing the firm of Donald Currie & Co., and the defendant Deutsche Dampschiffahrts Gesellschaft, Hansa, were and still are owners and charterers of and control as common carriers steamships plying and intend to ply between the port of New York and ports in South and East Africa, and offer to carry for hire as such common carriers merchandise intended for transportation between said ports, and hold themselves out to the public as such common carriers aforesaid.

Eleventh. That at some time prior to December, in the year 1898, and at a time when the transportation trade between the United

States and the South African ports began to grow in importance, the defendants Union Castle Mail Steamship Company, Limited; the firm of Cayser, Irvine & Co., the firm of Barber & Co., the Bucknall Steamship Lines, Limited; the firm of Donald Currie & Co. and the firm of Norton & Son entered into a contract or agreement and engaged in and formed an illegal combination and conspiracy among themselves in restraint of trade and commerce among

14 the several States of the United States and with foreign nations in violation of the statutes in such case made and provided by the United States of America, in Congress assembled, and combined and conspired among themselves and formed a scheme or traffic agreement among themselves for their gain and profit for the unlawful purpose of suppressing competition and of securing and maintaining a monopoly of the carrying trade and commerce between the ports of the United States and South African ports, in which said scheme or traffic agreement they agreed to make a certain discrimination in the rates of freight to be charged, which was calculated to coerce and prevent these complainants having occasion to employ common carriers between the port of New York and South African ports, and all other shippers and merchants similarly situated, from employing such agencies and facilities of transportation as may be offered to them by other common carriers than the defendant just aforementioned, and to restrain all other common carriers from serving the public between said ports; and in order to carry out said scheme and conspiracy and in furtherance of same as aforesaid the said defendants just aforementioned announced to the merchant public, that they, the said defendants, would thereafter be united and be known under the name of style of "The South African Steam Lines," and thereupon issued and distributed among merchants trading in this port with South African ports, among whom are the complainant's printed circulars, a copy of which is hereto annexed and made part of the complaint and marked Exhibit "A."

Twelfth. That in and by said circular the defendants last above named announced to those engaged in the exporting trade to
15 South African ports that those shippers who would not submit to the conditions and terms set out and imposed by said circular would have to pay a higher rate of freight than those shippers who would so submit thereto.

Thirteenth. That the conditions and terms so imposed by said last-named defendants, and the higher rate of freight fixed by them in and by reason of said combination and conspiracy are unlawful and against public policy, and have been intended to be, and are in restraint of trade and commerce among the States and with foreign nations, and are and have been unreasonable, extortionate and oppressive, in that among other reasons:

(1.) Said defendants thereby exact from all shippers and compel them arbitrarily to pay at the time of shipment of merchandise, a higher rate of freight by said defendants so unreasonably and extortionately fixed, and which said defendants have called tariff rates.

(2.) Said defendants thereby discriminate between the several shippers of goods of the same class to South African ports by their

promise of returning or paying back as a rebate a part of the said higher rates of freight to such shippers, arbitrarily called by them "loyal shippers," as will have shipped their goods to said ports exclusively by the steamers owned or controlled by the defendants.

(3.) Said defendants thereby compel such shippers to remain loyal for an indefinite period of time by imposing as an additional condition for the payment or allowance of said rebate, that each of such "loyal shippers" shall, on the 31st of January and on the 31st of July of every year, make a statement of all the shipments by him made during the semi-annual period next preceding the time
16 of making said statement and shall therein declare to have been "loyal" to the defendants and not to have directly or indirectly made or been interested in any shipments to any of the aforesaid ports, by vessels other than those dispatched or controlled by the defendants.

(4.) Said defendants thereby further compel such shippers to remain indefinitely "loyal" by imposing on them as a further condition for the payment or allowance of said rebate, that nine months further time of probation of their loyalty from the date of said statement should elapse before said rebate shall be paid to them.

(5.) Said defendants thereby further compel such shippers to remain indefinitely "loyal" by imposing on them as a further condition for the said payment or allowance of said rebate that during the said further period of nine months the said shipper shall have remained "loyal" and shall not have directly or indirectly made or been interested in any shipment to any of the aforesaid ports by vessels other than those dispatched or controlled by the defendants.

(6.) Said defendants thereby exact as a further condition of the payment of said rebate, that each and every one of the consignees in South Africa, to whom the goods shipped by such "loyal shippers" are consigned, during the indefinite period of time aforesaid, shall also have been "loyal" to the said defendants and shall not have directly or indirectly received or imported goods into South Africa by vessels other than those dispatched or controlled by the defendants.

(7.) Said defendants thereby exact the further conditions
17 that said rebate shall be paid by them, the said defendants, only to those shippers whose names appear on the bills of lading, or to their order.

(8.) And finally they exact further, that each of such shippers must make his said statement in a certain form prepared by the defendants aforesaid, and which is embodied on the back of said circular, wherein and whereby such shippers must subscribe to the statement that he has received notice of said circular and that he has fully complied with all the terms and conditions thereof.

Fourteenth. That about the middle of the year 1901, the defendant, Deutsche Dampschiffahrts Gesellschaft, Hansa, and the firm of Funch, Edye & Co., as its agents, offered to transport merchandise to South African ports at reasonable rates and lower than those imposed by the defendants first above mentioned, but thereupon the said other defendants mentioned, for the purpose of avoiding and

suppressing the competition so challenged by the said defendant, Deutsche Dampschiffahrts Gesellschaft, Hansa, requested, allowed and accepted the said Deutsche Dampschiffahrts Gesellschaft, Hansa, and the firm of Funch, Edye & Co., to become part of the scheme and combination aforesaid, and for such purpose all of the defendants herein agreed to maintain and continue together the monopoly of the transportation trade to South African ports so established as aforesaid, and in furtherance of the said purpose, issued on or about the 1st day of December, 1901, printed circulars to all exporters in the South African trade, a copy of which is hereto annexed and marked Exhibit "B" and made part of this complaint; which circular contains the identical conditions and terms set forth in the previous circular issued, as hereinbefore mentioned and

18 marked Exhibit "A" and which contains only the additional announcement that the defendant, Deutsche Dampschiffahrts Gesellschaft, Hansa, had been added as one of the parties to the first-named agreement.

Fifteenth. That the defendants herein, thereafter adopted a verbal agreement to said circulars, without altering the wording of the same, to the effect that the so-called "loyal" consignees could collect the so-called rebates, regardless of whether or not the shippers were also "loyal" as aforesaid; but on the condition that in the case where the shippers and consignees were both "loyal" the rebates would be paid to the shipper, while if the consignee alone were "loyal" and not the shipper, the rebate would be paid by the defendants in London direct to the so-called "loyal" consignee.

Sixteenth. That the defendants herein have at no time dispatched steamers from the United States to South African ports at stated and regular days of sailing, but have placed steamers on berth to receive general cargo, only at such times and for such ports in South Africa as they deemed best for their own private gain and profit.

Seventeenth. That by reason of the monopoly so created and maintained by all the defendants herein the merchants in the United States doing business in the exporting trade to South African ports, among whom are these complainants, have been restrained from trading freely with said ports, through such carrier or carriers as offer the best and most reasonable facilities and inducements, but have been compelled to submit to the hardships and inconvenience of the monopoly created and maintained by all of the defendants herein, and to pay the higher rates of freight as aforesaid; and by reason of their compulsory submission to the monopoly so

19 unreasonably, unwarrantably and unlawfully created and maintained by all the defendants herein the same have been enabled to compel payment from the various shippers to South African ports among whom are the complainants, of large amounts of freight paid at the time of shipment on the basis of the higher unreasonable and unlawful rates fixed by the defendants, as above set forth, and to such an extent as to leave at the present time in defendants' possession collectively, as complainants are informed and verily believe, about the sum of one million and a half of dollars or more, representing the extortionate amounts received in excess

and made up by the difference between the higher rate exacted and collected at the time of shipment as above set forth, and the lower rate, alleged by defendants as aforesaid to be fair and reasonable rate, and out of such amount the sum of £1,112, 7s. 11d. has been forcibly so received, exacted and extorted from the complainants herein by the said defendants.

Eighteenth. That certain two Steamship Companies known respectively as the Prince Line and the Houston Line have since the Spring of the year 1902, offered to the export trade from the United States to South Africa, to carry from the port of New York to South African ports hereinbefore mentioned, merchandise for a reasonable and remunerative freight lower than that exacted by the defendants herein.

Nineteenth. That the said defendants, for the purpose of restraining and excluding said two lines of steamers from legitimately competing for said carrying trade, and abusing the power consequent upon the possession of said large sums of money, arbitrarily extorted and held by them as aforesaid by reason of the two circulars marked herein Exhibit "A" and Exhibit "B," have in addition to the
20 same, imposed upon the said South African export trade, among whom are these complainants, further and more unreasonable and unlawful and oppressive conditions and terms than the conditions and terms by them already extorted under the circulars aforesaid, in that while they ostensibly reduced the lower rate of freight and announced that they would pay the greater difference arising therefrom, by them called a special commission, they still exacted the payment of the higher rates of freight, by them called tariff rate, at the time of the shipment, and imposed the following further conditions, viz.:

(1.) That precedent to the payment of such difference between the higher or tariff rates and the reduced lower rate of freight, so by them called Special Commission, they required that all shippers and all consignees as well should be "loyal" to the defendants.

(2.) That each shipper should at the time of the shipment disclose the name of his consignee, and further:

(3.) That the difference between the higher and reduced lower freight so offered would be only computed on those steamers which would come into direct competition with the steamers of either the said Prince Line or the Houston Line, called by the defendants "fighting steamers;"

(4.) That said Special Commission or rebate would be granted only on limited amounts of freight room, to be allotted at the will and discretion of the defendants herein, and that for any additional amount of freight room "loyal" shippers would have to pay the higher rate of freight, by them called tariff rates, under the previous conditions hereinbefore set forth and embodied in said circulars
21 hereunto annexed and marked Exhibits "A" and "B" respectively.

Twentieth. That the new conditions so superimposed upon the conditions already existing have been intended by the defendants to further restrain, hinder and delay those shippers who had already

shipped goods under the conditions and terms which defendants had originally imposed by said circulars as aforesaid, and in fact have prevented said shippers from further exporting as much merchandise to South African ports at reasonable rates offered by other steamers, all of which is shown by the defendants' other circulars, among which two are hereto annexed and made part of this complaint and marked respectively Exhibits "C" and "D."

Twenty-first. That for the purpose of further securing to themselves the monopoly of the carrying trade to South African ports, and of ousting the lawful competition of said other steamers, as aforesaid, said defendants have threatened to withhold and have withheld by way of forfeit, the repayment of the so called by them rebates from all those among whom are the complainants, so called by them "loyal shippers" and "loyal consignees," as aforesaid, who would not continue to remain loyal under the additional conditions superimposed as aforesaid.

Twenty-second. That as an illustration of the premises, these complainants allege that on two certain occasions, among others, these complainants offered to ship on defendants' steamers one thousand tons of merchandise on one occasion and eight hundred tons on another, but the defendants would only allow these complainants to ship at the lower rates, 150 tons on the former and 100 tons on the latter occasion, and required them to pay for the balance
22 of the said shipments over and above said 150 and 100 tons respectively, the higher rate of freight, which rate was higher than that offered by the said opposition lines for all the freight room required by these complainants, and defendants threatened that if the complainants should elect to make said shipments with said opposition lines under those more favorable terms as aforesaid, they, the said defendants, would withhold from repaying to these complainants all sums previously so compulsorily paid by these complainants as aforesaid.

Twenty-third. The complainants are informed and verily believe that since the said opposition steamer lines offered to carry freight to South African ports these defendants have by reason of said conspiracy refused to allot uniform and proportionate freight room on their respective steamers intended and advertised to be dispatched by them between the port of New York and South African ports, and have arbitrarily discriminated between several shippers and even against the so-called "loyal" shippers and assignees, with the unlawful intent that the moneys so held by them as aforesaid would be sufficient security to prevent such "loyal" shippers and consignees from making shipments of or importing their goods by the competing vessels.

Twenty-fourth. That by reason of the conspiracy and scheme so formed as aforesaid by these defendants, these complainants, and others similarly situated, have been compelled either not to ship at all and lose a great part of their trade or to ship on defendants' steamers a small portion of merchandise at the lower rates, and the remainder, of the same class and even of the identical lot of merchandise at the higher rates, which is practically prohibitive of any trade whatever by reason that the substantial difference between the

23 two rates of freight would be a great discrimination against the various consignees and customers of these complainants and the various shippers and customers of other shippers by the same steamer.

Twenty-fifth. That the said unlawful conspiracy, scheme and combination between said defendants as aforesaid is in direct violation of the laws of the United States, in such case made and provided, especially of the act of Congress passed July 2, 1890, ch. 647, entitled, An Act to protect Trade and commerce against unlawful restraints and Monopolies.

Twenty-sixth. That by reason of the premises these complainants have been damaged in the sum of £1,112, 7s. 11d., equal to \$5,560 for money paid in excess of the rates by defendants deemed to be reasonable, fair and profitable, and in the further sum of ten thousand dollars for loss and damage sustained by reason of the restraint of their business and trade as aforesaid.

Twenty-seventh. That by virtue of said act of Congress these complainants are entitled to a sum equivalent to treble the amount of damages sustained by them as aforesaid.

Wherefore, the complainants demand judgment against the defendants and each of them for treble damages under the provisions of the act of Congress aforesaid, which amounts to the sum of \$46,680 dollars, with interest and costs of this action.

ULLO & RUEBSAMEN,
Attorneys for Plaintiffs,
11 Broadway, New York City.

SOUTHERN DISTRICT OF NEW YORK, ss:

24 H. A. Thomsen, being duly sworn, deposes and says that he is one of the plaintiffs named in the above-entitled action, that he has read the complaint therein and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

H. A. THOMSEN.

Sworn to before me this 8th day of June, 1903.

[NOTARY'S SEAL.]

ARNO PLOTHOW,
Notary Public.

EXHIBIT "A."

The South African Steam Lines.

Notice to Shippers in the United States.

Commission in Respect of Shipments by Steam and Sailing Vessels.

LONDON, 31st December, 1898.

1. Shippers to all Ports of the Cape Colony and of Natal, and to Delagoa Bay, are hereby informed that until further notice, and

subject to the conditions and terms set out herein each of the under-named Lines will pay Shippers by their Line a commission of ten per cent., calculated upon the net amount of freight at tariff rates received by such Line from such Shippers on their shipments from the United States to South Africa.

2. The said Commission to be computed every six months up to the 31st January and 31st July in each year, and to be payable nine months after such respective dates to those shippers only who, until the date at which the Commission shall become payable shall

25 have shipped exclusively by vessels despatched by the under-named Lines respectively from the United States to Ports of the Cape Colony, Natal, and Delagoa Bay, provided that such shippers, either as Principals or as Agents, have not directly or indirectly made or been interested in any shipments to any of the aforesaid Ports by vessels other than those despatched by the under-named, and also provided that the Statement of Claim for such commission shall be made in the annexed form, within twelve months of the date of shipment, to the Line which shall have carried the goods in respect of which the Commission is claimed.

3. The above commission is not payable on the goods of any Consignee who directly or indirectly imports goods by vessels other than those despatched by the under-named Lines.

(Subscribed) AMERICAN AND AFRICAN STEAM-SHIP LINE.
UNION-CLAN LINE.

All previous notices to Shippers or Consignees with reference to returns on Freight are cancelled.

NOTE.—The above Commission will be payable to the Shippers whose names appear on the Bills of Lading or to their Order.

The South African Steam Lines.

Form for Statement of Claim for Commission in Respect of Shipments.

189—.

To ———.

I
GENTLEMEN: We beg to hand you the under noted list of our my
shipments by the vessels despatched by your Line during the six I

months ended

upon which shipments we
claim the Commission referred to in the Notice to Shippers
26 on the first page hereof dated 31st December, 1908, and
such claim we make in accordance with, and on the terms I

and conditions of the said Notice, which we have received, and with I

which terms and conditions we have complied.

The following are the particulars of the above-mentioned shipments, and they are in accord with the Bills of Lading.

I
we remain,
Gentlemen,
Yours truly,
Signature of Shipper _____
Address _____.

NOTE.—This declaration must be signed by a partner of the Firm claiming the Commission or by some one holding the Firm's procuration.

Date of sailing.	Vessel.	Port.	No. of bill of lading.	Marks.
Net freight.			Amount of commission claimed.	

EXHIBIT "B."

The South African Steam Lines.

Notice to Shippers in the United States.

Commission in Respect to Shipments by Steam and Sailing Vessels.

LONDON, 1st November, 1901.

1. Shippers to all ports of the Cape Colony and of Natal and of Delagoa Bay, are hereby informed that until further notice, and subject to the conditions and terms set out herein, each of the under-named Companies will pay to Shippers by vessels despatched by them respectively a Commission of ten per cent., calculated upon the net amount of freight at tariff rates received by such

27 Company from such Shippers on their shipments from the United States to South Africa.

2. The said Commission to be computed every six months up to the 31st January and 31st July in each year, and to be payable nine months after such respective dates to those Shippers only who, until the date at which the Commission shall become payable, shall have shipped exclusively by vessels despatched by the undernamed Companies respectively from the United States to ports of the Cape Colony, Natal and Delagoa Bay, provided that such Shippers, either as Principals or as Agents, have not directly or indirectly made or been interested in any shipments to any of the aforesaid ports by vessels other than those despatched by the undernamed, and also provided that the Statement of Claim for such Commission shall be made in the annexed form, within twelve months of the date of shipment, to the Company which shall have carried the goods in respect of which the Commission is claimed.

3. The above Commission is not payable on the goods of any Con-

signee who directly or indirectly imports goods by vessels other than those despatched by the undernamed Companies.

Donald Currie & Co., Bucknall Steamship Lines, Ltd., hitherto working as American and African Steamship Line.

Union-Castle Mail Steamship Company, Ltd., Cayser, Irvine & Co., hitherto Working as Union-Clan Line.

Hansa Steam Navigation Co., of Bremen.

This Notice is substituted for the Circular dated 31st December, 1898, for Shipments made from date hereof.

NOTE.—The above Commission will be payable to the Shippers whose names appear on the Bills of Lading, or to their Order.

28

The South African Steam Lines.

Form of Statement of Claim for Commission in Respect of Shipments.

To Messrs. The Union-Castle Mail Steamship Company, Ltd. or Messrs. Donald Currie & Co. (as the case may be).

190—.

I

my

GENTLEMEN: we beg to hand to you the undernoted list of our shipments by the vessels despatched by you during the six months

I

ended upon which shipments we claim the Commission referred to in the Notice to Shippers on the

I

first page hereof dated 1st November, 1901, and such claim we make in accordance with and on the terms and conditions of the

I

said Notice, which we have received, and with which terms and conditions we have complied.

I

The following are the particulars of the above mentioned shipments, and they are in accord with the Bills of Lading.

I

we remain,

Gentlemen,

Yours truly,

Signature of Shipper

Address ———.

— — —.

NOTE.—This declaration must be signed by a Partner of the Firm claiming the Commission, or by some one holding the Firm's procuration.

Date of sailing.

Vessel.

Port.

No. of bill of lading.

Marks.

Net freight.

Amount of commission claimed.

29

EXHIBIT "C."

Copy of Circular Issued by Messrs. Norton & Son, Agents, American & African Life, Re Corfe Castle for Natal and East London.

NEW YORK, July 24th, 1902.

DEAR SIR: Announcement is made to the trade that the S/S Corfe Castle is intended to be dispatched for the port of Port Natal, South Africa, on or about August 10th, with privilege of calling also at East London, and that freight room may be engaged at current tariff rates, subject to a return commission on goods shipped to Port Natal for an amount to be arranged (uniform to all qualifying shippers), which will be paid to all shippers here who can qualify for it by certifying that they have not made, nor been interested in, any shipments, directly or indirectly, between this date and thirty days after the departure of the vessel, by any steamer or steamers sailing to any port or ports in South Africa, other than those dispatched by the undernamed Companies:

Donald Currie & Co., Bucknall Steamship Lines, Ltd., Hitherto Working as American & African Steamship Line.

Union-Castle Mail Steamship Co., Ltd.

Cayser, Irvine & Company, hitherto working as Union Clan Line.
Hansa Steam Navigation Co., of Bremen.

There will also be a special commission in an amount to be named on all goods shipped to East London, subject to the conditions above stated.

Freight must be paid at tariff rates. The above Commissions will be returned in cash on the presentation of the qualifying certificate thirty days after the steamer's departure. Any goods received on the steamer will be subject to the terms of this circular.

30 Where a cash rebate is granted under this circular, the commission under the circular of April 18th, 1902, will only be paid on the net amount of freight retained by the steamer.

(Signed)

NORTON & SON, Agents.

EXHIBIT "D."

Copy of a Circular Issued by Messrs. Barber & Co., Agents, Union Clan Line, Re S. S. Clan Macmillan for East London.

NEW YORK, Aug. 6th, 1902.

DEAR SIR: Announcement is made to the trade that the S/S. Clan Macmillan, or substitute, is intended to be despatched as a fighting Steamer for the port of East London, South Africa, on or about the 1st of September next, with the privilege of calling first at Mossel Bay and Delagoa Bay, and that freight room may be engaged at current tariff rates, subject to an extra return commission on goods

shipped to East London for an amount to be arranged (uniform to all qualifying shippers) which will be paid to all shippers here who can qualify for it by certifying that they have not made or been interested in any shipments, directly or indirectly, between this date and thirty days after the departure of the vessel, by any steamer or steamers sailing to any port or ports in South or East Africa, other than those despatched by the under-named companies:

Donald Currie & Co., Bucknall Steamship Lines, Ltd., Hitherto working as American & African Steamship Lines.

Union-Castle Mail Steamship Co., Ltd., Cayser, Irvine & Co., hitherto working as Union Clan Line.

Hansa Steam Navigation Co. of Bremen.

31 There will also be a special commission in an amount to be named on all goods shipped to Mossel Bay and Delagoa Bay, subject to the conditions above.

Freight must be paid at tariff rates. The above commissions will be returned in cash on presentation of the qualifying certificate thirty days after the steamer's departure. Any goods received on the steamer will be subject to the terms of this circular; where a cash rebate is granted under this circular, the commission under the circular of April 18th, 1902, will only be paid on the net amount of freight retained on the steamer.

(Signed)

BARBER & CO., Agents.

(Endorsed:) United States Circuit Court, Southern Dist. of New York. Hugo Adelbert Thomsen et al., Plaintiffs, against Union-Castle Mail Steamship Company, Limited, et al., Defendants.—Summons and Complaint.—Ullo and Rubsamen, Attorneys for Plaintiffs, Office and P. O. address, No. 11 Broadway, New York City.—U. S. Circuit Court, Southern District New York.—Filed Jun-11, 1903.—John A. Shields, Clerk.

32 Circuit Court of the United States, Southern District of New York.

HUGO ADELBERTO THOMSEN, GUSTAV A. FEDDERSON, HEINRICH JOHANNES REIDEL, and EDWARD H. MULLER, Composing the Firm of Thomsen & Co., Plaintiffs,

against

UNION-CASTLE MAIL STEAMSHIP COMPANY, LIMITED; SIR CHARLES W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock, and John Percival, Composing the Firm of Cayser, Irvine & Co., Bucknall Steamship Lines, Limited, and Others, Defendants.

Please take notice that we appear in the above-entitled action for the defendants Sir Charles W. Cayser, Charles W. Cayser, Jr.; August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh

Gibb, John Joss, G. T. Portlock and John Percival, composing the firm of Cayser, Irvine & Company; Herbert Barber and James
 33 Barber, composing the firm of Barber & Co., and require notice and service of all papers affecting them.

Dated New York, June 12, 1903.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Att'ys for Above-named Defendants.

To Messrs. Ullo & Ruebsamen, Plaintiff's Attorneys, 11 Broadway.

John A. Shields, Esq., Clerk United States Circuit Court Southern District of New York.

(Endorsed:) United States Circuit Court, Southern District of N. Y.—Hugh Adelberto Thomsen and others against Union-Castle Mail S. S. Co. Ltd. and others.—Notice of Appearance.—Butler, Notman, Joline & Mynderse, Att'ys for Defendants, 54 Wall St., New York City.—U. S. Circuit Court, Southern District New York.—Filed Jun- 12, 1903.—John A. Shields, Clerk.

34 United States Circuit Court, Southern District of New York.

HUGO ADELBERTO THOMSEN and Others, Plaintiffs,
 against
 UNION-CASTLE MAIL STEAMSHIP COMPANY, LIMITED, and Others,
 Defendants.

Answer.

The defendant The Union-Castle Mail Steamship Company, Limited, answering the complaint herein, by its attorneys, Convers & Kirlin, respectfully shows unto this Court, on information and belief, as follows:

First. It admits the matters alleged in the first article of the complaint.

Second. It denies the matters alleged in the second article of the complaint.

Third. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the third article of the complaint.

Fourth. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the fourth article of the complaint.

Fifth. It admits that at the time the complaint herein
 35 was filed the defendants Sir Donald Currie, Sir Francis Henry Evans, David Martin Currie, Frederick James Mirrieles, George Alexander Keith Wisely, Percy Alport Molento, Alastair Currie, John Macmartin Currie and Murland Degrasse Evans were and they still are co-partners, doing business under the firm name of

Donald Currie & Company, but it denies the other matters alleged in the fifth article of the complaint.

Sixth. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the sixth article of the complaint.

Seventh. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the seventh article of the complaint.

Eighth. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the eighth article of the complaint.

Ninth. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the ninth article of the complaint.

Tenth. It denies the matters alleged in the tenth article of the complaint.

Eleventh. It denies the matters alleged in the eleventh article of the complaint.

Twelfth. It denies the matters alleged in the twelfth article of the complaint.

Thirteenth. It denies the matters alleged in the thirteenth article of the complaint.

36 Fourteenth. It admits that it issued, on or — December 1,

1901, a printed circular, of which what purports to be a copy is annexed to the complaint, marked Exhibit "B," but for greater certainty as to the terms of the said circular, this defendant refers to the said circular. This defendant denies the other matters alleged in the fourteenth article of the complaint.

Fifteenth. It denies the matters alleged in the fifteenth article of the complaint.

Sixteenth. It admits that this defendant, at intervals, placed steamers owned by it, or chartered steamers to be placed on berth to receive general cargo from the United States to South African ports, but it denies that it has any knowledge or information sufficient to form a belief as to the other matters alleged in the sixteenth article of the complaint.

Seventeenth. It denies the matters alleged in the seventeenth article of the complaint.

Eighteenth. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the eighteenth article of the complaint.

Nineteenth. It denies the matters alleged in the nineteenth article of the complaint.

Twentieth. It admits that this defendant issued a printed circular, of which what purports to be a copy is annexed to the complaint and marked Exhibit "C," but for greater certainty as to the terms of the said circular, this defendant refers to one of the said circulars. This

37 defendant denies that it has any knowledge or information sufficient to form a belief as to the copy circular marked Exhibit "D" and annexed to the complaint, and it denies the other matters alleged in the twentieth article of the complaint.

Twenty-first. It admits that it has refused to pay to the plaintiffs certain commissions claimed as rebates by the plaintiffs, but it denies the other matters alleged in the twenty-first article of the complaint.

Twenty-second. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the twenty-second article of the complaint.

Twenty-third. It denies the matters alleged in the twenty-third article of the complaint.

Twenty-fourth. It denies the matters alleged in the twenty-fourth article of the complaint.

Twenty-fifth. It denies the matters alleged in the twenty-fifth article of the complaint.

Twenty-sixth. It denies the matters alleged in the twenty-sixth article of the complaint.

Twenty-seventh. It denies the matters alleged in the twenty-seventh article of the complaint.

Twenty-eighth. Further answering, and as a separate and distinct defense herein, this defendant alleges that any and all cargo that was carried by this defendant for the plaintiffs, or was shipped by the plaintiffs on any vessel or vessels owned or operated by this defendant, in whole or in part, between New York and South African ports, was shipped and carried in each instance pursuant to one or more bills of lading, each of which contained on its face a statement of the amount of freight to be paid for the carriage of the said goods, and in which and with respect to which, in every such instance, the plaintiffs either paid the freight at once or agreed with the defendant or its agents to pay the quantity of freight stated in the said bill of lading, and, further, in each and every instance the plaintiffs, on receipt of each of the said bills of lading, gave to this defendant, or its agent, a due bill promising to pay, on demand or within a short specified time thereafter, the amount of freight specified on the said bill of lading, and in each and every instance the plaintiff subsequently did make the payments of freight in accordance with the terms of the said bills of lading and their due bills or promises to pay with respect thereto. This defendant further alleges that any and all payments that were made by the plaintiffs to this defendant, or its agents, by way of freight for goods which were from time to time carried on a vessel or vessels owned or operated in whole or in part by this defendant from New York to South African ports, were made by the plaintiffs pursuant to the terms of the bills of lading that were issued therefor in each instance, and were made freely and voluntarily, and without any protest or reservation of rights on the part of the plaintiffs; and in so far as any of the said payments were made pursuant or with reference to the circulars referred to by the plaintiffs in the complaint as Exhibits "A," "B," "C" and "D," the plaintiffs co-operated knowingly in the said transactions, and the plaintiffs cannot now be heard to complain of the said transactions, nor are plaintiffs entitled to any relief on account of payments of freight made by them thereunder.

Wherefore, this defendant prays that the complaint herein be dismissed, with costs, or that the Court will grant to this
 39 defendant such other and further relief as the justice of the cause may require.

CONVERS & KIRLIN,

Attorneys for Defendant Union Castle Mail S. S. Co., Ltd.

No. 5 Beekman Street, New York City.

SOUTHERN DISTRICT OF NEW YORK,

County of New York, ss:

Alfred McLean Wait, being duly sworn, says: I am marine superintendent of the Union Castle Mail Steamship Company, Ltd., at New York, and the agent for this defendant for the purpose of verifying this answer. The foregoing answer is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true. The sources of my information and the reasons for my belief as to the matters not within my own knowledge, are communications received from this defendant.

The reason why this verification is not made by this defendant is that it is a foreign corporation and none of its officers is now within the United States.

A. McLEAN WAIT.

Sworn to before me this 4th day of September, 1903.

[SEAL.]

CHARLES R. HICKOX,

Notary Public, New York County.

(Endorsed:) United States Circuit Court.—Hugo Adelberto Thomsen and others, Plaintiffs, against Union Castle Mail Steamship Co., Ltd., and others, Defendants.—Answer of Union Castle Mail Steamship Co., Ltd.—Convers & Kirlin, Att'ys for Defendant, 5 Beekman St., New York, N. Y.—U. S. Circuit Court, Southern District New York.—Filed Sep. 8, 1903.—John A. Shields, Clerk.

40 Circuit Court of the United States, Southern District of New York.

HUGO ADELBERTO THOMSEN, GUSTAV A. FEDDERSON, HEINRICH Johannes Rieder, and Edward H. Muller, Composing the Firm of Thomsen & Co., Plaintiffs,
 against

SIR CHARLES W. CAYZER, CHARLES W. CAYZER, JR.; AUGUST B. T. Cayzer, Arthur E. D. Cayzer, Herbert R. Cayzer, Hugh Gibb, John Joss, G. T. Portlock, and John Percival, Composing the Firm of Cayzer, Irvine & Co., Impleaded with the Union-Castle Mail Steamship Company, Limited, and Others, Defendants.

The answering defendants Sir Charles W. Cayzer, Charles W. Cayzer, Jr.; August B. T. Cayzer, Arthur E. D. Cayzer, Herbert R.

Cayzer, Hugh Gibb, John Joss, G. T. Portlock and John Percival, composing the firm of Cayzer, Irvine & Co., by Butler, Notman, Joline & Mynderse, their attorneys, answer as follows the complaint herein, upon information and belief:

First. The answering defendants admit the matters alleged in the first article of the complaint.

Second. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the second article of the complaint.

41 Third. The answering defendants admit that at the times mentioned in the complaint, and at the present time they constituted, and still constitute, a copartnership under the name of Cayzer-Irvine & Co., and deny the other matters alleged in the third article of the complaint.

Fourth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the fourth article of the complaint.

Fifth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the fifth article of the complaint.

Sixth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the sixth article of the complaint.

Seventh. The answering defendants admit that the defendants Herbert Barber and James Barber, under the firm name of Barber & Co., were and still are agents in the port of New York of these answering defendants, and they deny knowledge or information sufficient to form a belief as to the other matters alleged in the seventh article of the complaint.

Eighth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the eighth article of the complaint.

Ninth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the ninth article of the complaint.

42 Tenth. The answering defendants deny each and every matter alleged in the tenth article of the complaint.

Eleventh. The answering defendants admit that they authorized the issuance and distribution among merchants trading in this port and South African ports, among whom are the complainants, a printed circular, of which what purports to be a copy is annexed to the complaint, marked "Exhibit A;" but for greater certainty as to the terms of said circular these answering defendants refer to one of said circulars, and these answering defendants deny each and every other matter alleged in the eleventh article of the complaint.

Twelfth. The answering defendants deny each and every matter alleged in the twelfth article of the complaint.

Thirteenth. The answering defendants deny the matters alleged in the thirteenth article of the complaint.

Fourteenth. The answering defendants admit that they authorized

the issuing on or about 1st December, 1901, of a printed circular, of which what purports to be a copy is annexed to the complaint marked "Exhibit B;" but for greater certainty as to the terms of said circular these answering defendants refer to one of said circulars, and they deny each and every other allegation in the fourteenth article of the complaint contained.

Fifteenth. The answering defendants deny each and every matter alleged in the fifteenth article of the complaint.

Sixteenth. The answering defendants admit that they have
43 at irregular intervals placed steamers owned by them or chartered steamers on the berth to receive general cargo from the United States to South African ports, and deny each and every other matter alleged in the sixteenth article of the complaint.

Seventeenth. The answering defendants deny each and every matter alleged in the seventeenth article of the complaint.

Eighteenth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the eighteenth article of the complaint.

Nineteenth. The answering defendants deny each and every matter alleged in the nineteenth article of the complaint.

Twentieth. The answering defendants admit that they authorized the issuance of a printed circular, of which what purports to be a copy is annexed to the complaint marked "Exhibit D;" but for greater certainty as to the terms of said circulars the answering defendants refer to one of said circulars, and they deny that they have knowledge or information sufficient to form a belief as to copy of a circular marked "Exhibit C" annexed to the complaint, and they deny each and every other matter alleged in the twentieth article of the complaint.

Twenty-first. The answering defendants admit that they refused to pay to the plaintiffs certain commissions claimed as rebates by the plaintiffs; but deny each and every other matter alleged in the twenty-first article of the complaint.

Twenty-second. The answering defendants deny knowl-
44 edge or information sufficient to form a belief as to each and every matter alleged in the twenty-second article of the complaint.

Twenty-third. The answering defendants deny each and every matter alleged in the twenty-third article of the complaint.

Twenty-fourth. The answering defendants deny each and every matter alleged in the twenty-fourth article of the complaint.

Twenty-fifth. The answering defendants deny each and every matter alleged in the twenty-fifth article of the complaint.

Twenty-sixth. The answering defendants deny each and every matter alleged in the twenty-sixth article of the complaint.

Twenty-seventh. The answering defendants deny each and every matter alleged in the twenty-seventh article of the complaint.

Twenty-eighth. Further answering the said complaint, and as a separate and distinct defense thereto the answering defendants allege that any and all cargo that was carried by these defendants for the

plaintiffs or was shipped by the plaintiffs on any vessel owned or operated by these defendants in whole or in part between New York and South African ports, was shipped and carried in each instance pursuant to one or more bills of lading each of which contained on its face a statement that the amount of freight to be paid for the carriage of said goods and in which and with respect to which in every such instance the plaintiffs agreed with the defendants or their agents to pay the amount of freight stated in said bills of lading;

45 and further, in each and every instance the plaintiffs on receipt of each of said bills of lading gave to these defendants or to their agents a due bill promising to pay on demand or within a short specified time thereafter the amount of freight specified in the said bills of lading, and in each and every instance the plaintiffs subsequently after the steamer had sailed and after they had forwarded or had opportunity to forward the said bills of lading to destination, did make without protest or objection the payments of freight in accordance with the terms of the said bills of lading and the due bills or promises to pay in respect thereto.

These answering defendants further allege that any and all payments that were made by the plaintiffs to these defendants or to their agents by way of freight for goods which were from time to time carried on a vessel or vessels owned or operated in whole or in part by these defendants from New York to South African ports were made by the plaintiffs pursuant to the terms of the bills of lading that were issued therefor in each instance, and were made freely and voluntarily and without any prejudice or reservation of rights on the part of the plaintiffs and in so far as any of the said payments were made pursuant to or with reference to the circulars referred to by the plaintiffs in the complaint as Exhibits "A," "B," "C," and "D," the plaintiffs co-operated knowingly in the said transactions, and the plaintiffs cannot now be heard to complain of the said transactions, nor are plaintiffs entitled to any relief on account of payments of freight made by them thereunder.

Wherefore these answering defendants pray that the complaint herein be dismissed with costs, or that the Court will grant to these answering defendants such other and further relief as the justice of the cause may require.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Attorneys for Answering Defendants.

46 SOUTHERN DISTRICT OF NEW YORK,
State and County of New York, ss:

Wilhelmus Mynderse, being duly sworn, deposes and says that he is a member of the firm of Butler, Notman, Joline & Mynderse, attorneys for these answering defendants; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

The sources of his information and the grounds of his belief are statements and communications written and oral received by him from these answering defendants.

The reason why this verification is not made by one of the defendants is that none of said defendants is now in the United States, the copartnership which they form being a foreign one.

WILHELMUS MYNDERSE.

Sworn to before me, this 9th day of September, 1903.

[SEAL.]

A. M. MENKEL,

Notary Public, Westchester Co.

Certif. filed in N. Y. Co.

(Endorsed:) United States Circuit Court, Southern District of N. Y.—Hugo Adelberto Thomsen and others, against Sir Charles W. Cayzer and others—Answer of the Defendants Cayzer and others.—Butler, Notman, Joline & Mynderse, Attys. for answering defendants, 54 Wall Street, New York City.—U. S. Circuit Court, Southern District New York.—Filed Sep. 9, 1903.—John A. Shields, Clerk.

47 United States Circuit Court for the Southern District of New York.

HUGO ADELBERTO THOMSEN and Others, Plaintiffs,
against

BUCKNALL STEAMSHIP LINES, LTD., Impleaded with UNION CASTLE MAIL STEAMSHIP CO., LTD., and Others, Defendants.

Answer.

The defendant, Bucknall Steamship Lines, Ltd., answering the complaint herein by its attorneys, Convers & Kirlin, respectfully shows unto this Court, on information and belief, as follows:

First. It admits the matters alleged in the first article of the complaint.

Second. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the second article of the complaint.

Third. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the third article of the complaint.

Fourth. It denies the matters alleged in the fourth article of the complaint.

Fifth. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the fifth article of the complaint.

48 Sixth. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the sixth article of the complaint.

Seventh. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the seventh article of the complaint.

Eighth. It admits that at the times mentioned in the complaint Edward N. Norton and Skeffington S. Norton were copartners, doing business under the firm name of Norton & Son, but it denies that at all the times mentioned in the complaint Norton & Son were the agents of this defendant, and it denies that it has any knowledge or information sufficient to form a belief as to the other matters alleged in the eighth article of the complaint.

Ninth. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the ninth article of the complaint.

Tenth. It denies the matters alleged in the tenth article of the complaint.

Eleventh. It denies the matters alleged in the eleventh article of the complaint.

Twelfth. It denies the matters alleged in the twelfth article of the complaint.

Thirteenth. It denies the matters alleged in the thirteenth article of the complaint.

Fourteenth. It admits that it issued, on or about December 1, 1901, a printed circular, of which what purports to be a copy is annexed to the complaint, marked Exhibit "B," but for greater certainty as to the terms of the said circular, this defendant refers to the said circular. This defendant denies the other matters alleged in the fourteenth article of the complaint.

Fifteenth. It denies the matters alleged in the fifteenth article of the complaint.

Sixteenth. It admits that this defendant, at intervals, placed steamers owned by it, or chartered steamers to be placed on berth to receive general cargo from the United States to South African ports, but it denies that it has any knowledge or information sufficient to form a belief as to the other matters alleged in the sixteenth article of the complaint.

Seventeenth. It denies the matters alleged in the seventeenth article of the complaint.

Eighteenth. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the eighteenth article of the complaint.

Nineteenth. It denies the matters alleged in the nineteenth article of the complaint.

Twentieth. It admits that this defendant issued a printed circular of which what purports to be a copy is annexed to the complaint and marked Exhibit "C," but for greater certainty as to the terms of the said circular, this defendant refers to one of the said circulars. This defendant denies that it has any knowledge or information sufficient to form a belief as to the copy circular marked

Exhibit "D" and annexed to the complaint, and it denies the other matters alleged in the twentieth article of the complaint.

Twenty-first. It admits that it has refused to pay to the plaintiffs certain commissions claimed as rebates by the plaintiffs, but it denies the other matters alleged in the twenty-first article of the complaint.

Twenty-second. It denies that it has any knowledge or informa-

tion sufficient to form a belief as to the matters alleged in the twenty-second article of the complaint.

Twenty-third. It denies the matters alleged in the twenty-third article of the complaint.

Twenty-fourth. It denies the matters alleged in the twenty-fourth article of the complaint.

Twenty-fifth. It denies the matters alleged in twenty-fifth article of the complaint.

Twenty-sixth. It denies the matters alleged in the twenty-sixth article of the complaint.

Twenty-seventh. It denies the matters alleged in the twenty-seventh article of the complaint.

Twenty-eighth. Further answering and as a separate and distinct defense herein, this defendant alleges that any and all cargo that was carried by this defendant for the plaintiffs, or was shipped by the plaintiffs on any vessel or vessels owned or operated by this defendant, in whole or in part, between New York and South African ports, was shipped and carried in each instance pursuant to one

or more bills of lading, each of which contained on its face a

51 statement of the amount of freight to be paid for the carriage

of the said goods, and in which and with respect to which,

in every such instance, the plaintiffs either paid the freight at once

or agreed with the defendant or its agents to pay the quantity of

freight stated in the said bill of lading, and, further, in each and

every instance the plaintiffs, on receipt of each of the said bills of

lading, gave to this defendant, or its agent, a due bill promising to

pay, on demand or within a short specified time thereafter, the

amount of freight specified on the said bill of lading, and in each

and every instance the plaintiff subsequently did make the payments

of freight in accordance with the terms of the said bills of lading

and their due bills or promises to pay with respect thereto. This

defendant further alleges that any and all payments that were made

by the plaintiffs to this defendant, or its agents, by way of freight for

goods which were from time to time carried on a vessel or vessels

owned or operated in whole or in part by this defendant from New

York to South African ports, were made by the plaintiffs pursuant

to the terms of the bills of lading that were issued therefor, and in

each instance, and were made freely and voluntarily and without

any protest or reservation of rights on the part of the plaintiffs, and

in so far as any of the said payments were made pursuant or with

reference to the circulars referred to by the plaintiffs in the com-

plaint as Exhibits "A," "B," "C" and "D," the plaintiffs co-operated

knowingly in the said transactions, and the plaintiffs cannot now

be heard to complain of the said transactions, nor are plaintiffs en-

52 titled to any relief on account of payments of freight made by them

thereunder.

Wherefore, this defendant prays that the complaint herein be

dismissed, with costs, or that the Court will grant to this de-

fendant such other and further relief as the justice of the

cause may require.

CONVERS & KIRLIN,

Attorneys for Bucknall Steamship Lines, Ltd.,

No. 5 Beekman Street, New York City.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Edward N. Norton, being duly sworn, says: I am a member of the firm of Norton & Sons, agents for the defendant, the Bucknall Steamship Lines, Ltd. The foregoing answer is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true. The sources of my information and the reasons for my belief as to the matters not within my own knowledge are communications received from the Bucknall Steamship Lines, Ltd. The reason this verification is not made by the Bucknall Steamship Lines, Ltd., is that it is a foreign corporation, and none of its officers are now within the United States.

EDWARD N. NORTON.

Sworn to before me this 4th day of September, 1903.

[SEAL.]

CHARLES R. HICKOX,
Notary Public, New York County.

(Endorsed:)—United States Circuit Court.—Hugo Adelberto Thomsen and others, Plaintiffs, against Bucknall Steamship Lines, Ltd., impleaded with Union Castle Mail S. S. Co., Ltd., and others, Defendants.—Answer of Bucknall Steamship Lines, Ltd.—Convers & Kirlin, Attys. for Defendant, 5 Beekman St., New York, N. Y.—U. S. Circuit Court, Southern District, New York.—Filed Sep. 8, 1903.—John A. Shields, Clerk.

53 United States Circuit Court, Southern District of New York.

HUGO ADELBERTO THOMSEN and Others, Plaintiffs,
against

SIR DONALD CURRIE, SIR FRANCIS HENRY EVANS, DAVID MARTIN Currie, Frederick James Mirrielees, George Alexander Keith Wisely, Percy Alport Molteno, Alastair Currie, John Macmartin Currie and Murland Degrasse Evans, Composing the Firm of Donald Currie & Company, Impleaded with Union Castle Mail Steamship Co., Ltd., and Others, Defendants.

Answer.

The defendants, Sir Donald Currie, Sir Francis Henry Evans, David Martin Currie, Frederick James Mirrielees, George Alexander Keith Wisely, Percy Alport Molteno, Alastair Currie, John Macmartin Currie and Murland Degrasse Evans, composing the firm of Donald Currie & Company, answering the complaint herein, by their attorneys, Convers & Kirlin, respectfully show unto this Court, on information and belief, as follows:

First. They admit the matters alleged in the first article of the complaint.

Second. They deny the matters alleged in the second article of the complaint.

54 Third. They deny that they have any knowledge or information sufficient to form a belief as to the matters alleged in the third article of the complaint.

Fourth. They deny that they have any knowledge or information sufficient to form a belief as to the matters alleged in the fourth article of the complaint.

Fifth. They admit that at the time the complaint herein was filed, the defendants, Sir Donald Currie, Sir Francis Henry Evans, David Martin Currie, Frederick James Mirrielees, George Alexander Keith Wisely, Percy Alport Molteno, Alastair Currie, John Macmartin Currie and Murland Degrasse Evans, were, and they still are, copartners doing business under the firm name of Donald Currie & Company, but they deny the other matters alleged in the fifth article of the complaint.

Sixth. They deny that they have any knowledge or information sufficient to form a belief as to the matters alleged in the sixth article of the complaint.

Seventh. They deny that they have any knowledge or information sufficient to form a belief as to the matters alleged in the seventh article of the complaint.

Eighth. They admit that at the times mentioned in the complaint Edward N. Norton and Sheffington S. Norton were copartners doing business under the firm name of Norton & Son, and they admit that at the time this action was instituted Norton & Son were agents for Donald Currie & Company for the purpose of representing them in this action, and they deny the other matters alleged in the eighth article of the complaint.

55 Ninth. They deny that they have any knowledge or information sufficient to form a belief as to the matters alleged in the ninth article of the complaint.

Tenth. They deny the matters alleged in the tenth article of the complaint.

Eleventh. They deny the matters alleged in the eleventh article of the complaint.

Twelfth. They deny the matters alleged in the twelfth article of the complaint.

Thirteenth. They deny the matters alleged in the thirteenth article of the complaint.

Fourteenth. They admit that they issued, on or about December 1, 1901, a printed circular, of which what purports to be a copy is annexed to the complaint, marked Exhibit B, but for greater certainty as to the terms of the said circular, these defendants refer to the said circular. These defendants deny the other matters alleged in the fourteenth article of the complaint.

Fifteenth. They deny the matters alleged in the fifteenth article of the complaint.

Sixteenth. They deny that these defendants placed steamers owned by it, or chartered steamers, to be placed on berth to receive general cargo from the United States to South African ports, as alleged, but they deny that they have any knowledge or informa-

tion sufficient to form a belief as to the other matters alleged in the sixteenth article of the complaint.

Seventeenth. They deny the matters alleged in the seventeenth article of the complaint.

56 Eighteenth. They deny that they have any knowledge or information sufficient to form a belief as to the matters alleged in the eighteenth article of the complaint.

Nineteenth. They deny the matters alleged in the nineteenth article of the complaint.

Twentieth. They admit that these defendants, as managers of the Union Castle Mail Steamship Company, Ltd., but not otherwise, issued a printed circular, of which what purports to be a copy is annexed to the complaint and marked Exhibit C, but for greater certainty as to the terms of said circular, these defendants refer to one of the said circulars. These defendants deny that they have any knowledge or information sufficient to form a belief as to the copy circular marked Exhibit D and annexed to the complaint, and they deny the other matters alleged in the twentieth article of the complaint.

Twenty-first. They admit that they have refused to pay to the plaintiffs certain commissions claimed as rebates by the plaintiffs, but they deny the other matters alleged in the twenty-first article of the complaint.

Twenty-second. They deny that they have any knowledge or information sufficient to form a belief as to the matters alleged in the twenty-second article of the complaint.

Twenty-third. They deny the matters alleged in the twenty-third article of the complaint.

Twenty-fourth. They deny the matters alleged in the twenty-fourth article of the complaint.

57 Twenty-fifth. They deny the matters alleged in the twenty-fifth article of the complaint.

Twenty-sixth. They deny the matters alleged in the twenty-sixth article of the complaint.

Twenty-seventh. They deny the matters alleged in the twenty-seventh article of the complaint.

Twenty-eighth. Further answering, and as a separate and distinct defense herein, these defendants allege that any and all cargo that may have been shipped by the plaintiffs between New York and South African ports on any vessel or vessels in the operation of which these defendants were interested as managers of the Union Castle Mail Steamship Company, Ltd., was shipped and carried in each instance pursuant to one or more bills of lading, each of which contained on its face a statement of the amount of freight to be paid for the carriage of the said goods, and in which and with respect to which, in every such instance, the plaintiffs either paid the freight at once or agreed to pay the quantity of freight stated in the said bill of lading, and, further, in each and every instance the plaintiffs, on receipt of each of the said bills of lading, gave to its ship's agents a due bill promising to pay, on demand or within a specified time thereafter, the amount of freight noted on the said bill of

lading, and in each and every instance the plaintiffs subsequently did make the payments of freight in accordance with the terms of the said bills of lading and their due bills or promises to pay with respect thereto. These defendants further allege that any and all payments that were made by the plaintiffs by the way of freight for goods which were from time to time carried on a vessel or vessels from New York to South African ports in the operation of which these defendants were interested as managers of the

58 Union Castle Mail Steamship Company, Ltd., were made by the plaintiffs pursuant to the terms of the bills of lading that were issued therefor, in each instance, and were made freely and voluntarily; and without any protest or reservation of rights on the part of the plaintiffs, and in so far as any of the said payments were made pursuant or with reference to the circulars referred to by the plaintiffs in the complaint as Exhibits A, B, C and D, the plaintiffs co-operated knowingly in the said transactions, and the plaintiffs cannot now be heard to complain of the said transactions, nor are plaintiffs entitled to any relief on account of payments of freight made by them thereunder.

Wherefore these defendants pray that the complaint herein be dismissed, with costs, or that the Court will grant to these defendants such other and further relief as the justice of the cause may require.

CONVERS & KIRLIN,

*Attorneys for Defendants, Donald Currie & Co.,
No. 5 Beekman Street, New York City.*

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Edward N. Norton, being duly sworn, says: I am a member of the firm of Norton & Sons, agents for the defendants Donald Currie & Co. for the purpose of representing them in this action. The foregoing answer is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true. The source of my information and the reasons for my belief as to the matters not within my own knowledge are communications received from the defendants Donald Currie & Co. The reason this verification is not

59 made by one of the defendants Donald Currie & Co. is that they are all non-residents, and none of them is within the United States.

EDWARD N. NORTON.

Sworn to before me this — day of September, 1903.

[SEAL.]

CHARLES R. HICKOX,
Notary Public, New York County.

(Endorsed:) United States Circuit Court, Southern Dist. of New York. Hugo Adelberto Thomsen and others, Plaintiffs, against Donald Currie & Co., Defendants. Answer of Donald Currie & Co.

Convers & Kirlin, Attys. for Donald Currie & Co., 5 Beekman St., New York, N. Y. U. S. Circuit Court, Southern District, New York. Filed Sep. 8, 1903. John A. Shields, Clerk.

60 Circuit Court of the United States, Southern District of New York.

HUGO ADELBERTO THOMSEN, GUSTAV A. FEDDERSON, HEINRICH Johannes Riedel and Edward H. Muller, Composing the Firm of Thomsen & Co., Plaintiffs,
against

HERBERT BARBER and JAMES BARBER, Composing the Firm of Barber & Co., Impleaded with the Union-Castle Mail Steamship Company, Limited, and Others, Defendants.

The answering defendants Herbert Barber and James Barber, composing the firm of Barber & Co., by Butler, Notman, Joline & Mynderse, their attorneys, answer as follows the complaint herein:

First. The answering defendants deny knowledge or information sufficient to form a belief as to any of the matters alleged in the first article of the complaint.

Second. The answering defendants admit, upon information and belief, that the Union Castle Mail Steamship Company, Limited, at the times mentioned in the complaint was and still is a foreign corporation, duly organized and existing under and by virtue
61 of the laws of the Kingdom of Great Britain and Ireland, and deny each and every other matter alleged in the second article of the complaint.

Third. The answering defendants admit, upon information and belief, that the defendants Sir Charles W. Cayzer, Charles W. Cayzer, Jr., August B. T. Cayzer, Arthur E. D. Cayzer, Herbert R. Cayzer, Hugh Gibb, John Joss, G. T. Portlock and John Percival were and still are copartners doing business under the firm name of Cayzer, Irvine & Co., and deny each and every other matter alleged in the third article of the complaint.

Fourth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the fourth article of the complaint.

Fifth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the fifth article of the complaint.

Sixth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the sixth article of the complaint.

Seventh. The answering defendants admit that at the times mentioned in the complaint they were copartners doing business under the firm name of Barber & Co., and that they were at certain of said times agents for the Union-Castle Mail Steamship Company, Limited, and for the defendants Cayzer, Irvine & Co., and they deny

each and every other matter alleged in the seventh article of the complaint.

62 Eighth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the eighth article of the complaint.

Ninth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the ninth article of the complaint.

Tenth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the tenth article of the complaint.

Eleventh. The answering defendants admit that as agents, they issued to merchants trading in this port and South African ports among whom were the complainants on request by them, a printed circular of which what purports to be a copy is annexed to the complaint marked "Exhibit A"; but for greater certainty as to the terms of said circular these answering defendants refer to one of said circulars; and these answering defendants deny each and every other matter alleged in the eleventh article of the complaint.

Twelfth. The answering defendants deny each and every matter alleged in the twelfth article of the complaint.

Thirteenth. The answering defendants deny each and every matter alleged in the thirteenth article of the complaint.

Fourteenth. The answering defendants admit that as agents they issued on or about 1st December, 1901, a printed circular of which what purports to be a copy is annexed to the complaint marked "Exhibit B"; and these answering defendants deny each and

63 every other matter alleged in the fourteenth article of the complaint.

Fifteenth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the fifteenth article of the complaint.

Sixteenth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the sixteenth article of the complaint.

Seventeenth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the seventeenth article of the complaint.

Eighteenth. The answering defendants deny knowledge or information sufficient to form a belief as to any of the matters alleged in the eighteenth article of the complaint.

Nineteenth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the nineteenth article of the complaint.

Twentieth. The answering defendants admit that as agents they issued a printed circular, of which what purports to be a copy is annexed to the complaint and marked "Exhibit B," but for greater certainty as to the terms of said circular these answering defendants refer to one of said circulars. They deny each and every other matter alleged in the twentieth article of the complaint.

64 Twenty-first. The answering defendants admit that they have refused to pay to the plaintiffs certain commissions claimed as rebates by the plaintiffs and deny each and every other matter alleged in the twenty-first article of the complaint.

Twenty-second. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the twenty-second article of the complaint.

Twenty-third. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the twenty-third article of the complaint.

Twenty-fourth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the twenty-fourth article of the complaint.

Twenty-fifth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the twenty-fifth article of the complaint.

Twenty-sixth. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the twenty-sixth article of the complaint.

Twenty-seventh. The answering defendants deny knowledge or information sufficient to form a belief as to each and every matter alleged in the twenty-seventh article of the complaint.

Twenty-eighth. Further answering the said complaint, and as a separate and distinct defense thereto, these answering defendants allege that any and all cargo that was carried for the plaintiffs by any
65 of the defendants for whom these answering defendants acted as agents, or that was shipped by the plaintiffs on any vessel or vessels owned or operated in whole or in part between New York and South African ports by any of the defendants for whom these answering defendants acted as agents, was shipped and carried in each instance pursuant to one or more bills of lading each of which contained on its face a statement of the amount of freight to be paid for the carriage of said goods, and in which and with respect to which in every such instance the plaintiffs agreed with these answering defendants, as agents, or with the defendants for whom these answering defendants acted as agents to pay the quantity of freight stated in said bills of lading. And further, in each and every instance the plaintiffs on receipt of each of the said bills of lading gave to these answering defendants as agents or to *be* defendants for whom these answering defendants acted as agents, a due bill promising to pay on demand or within a specified time thereafter the amount of freight specified on the said bills of lading, and in each and every instance the plaintiffs subsequently after the steamer had sailed and after they had forwarded or had opportunity to forward the said bills of lading to destination, did without protest or objection, make the payments of freight in accordance with the terms of said bills of lading, and their due bills or promises to pay with respect thereto.

These answering defendants further allege that any and all payments that were made by the plaintiffs to these answering defendants or to the defendants for whom these answering defendants acted as agents by way of freight for goods which were from time

to time carried on a vessel or vessels owned or operated from New York to South African ports in whole or in part by the defendants for whom these answering defendants acted as agents, were made by the plaintiffs pursuant to the terms of the bills of lading that were issued therefor in each instance, and were made freely and voluntarily and without any protest or reservation of rights on the part of the plaintiffs and in so far as any of said payments were made pursuant to or with reference to the circulars referred to by the plaintiffs in the complaint as Exhibits "A," "B," "C," and "D," the plaintiffs co-operated knowingly in the said transaction and the plaintiffs cannot now be heard to complain of the said transaction, nor are the plaintiffs entitled to any relief on account of the payments of freight made by them thereunder.

These answering defendants further allege that they did not, in any transaction in which they may have been concerned with the plaintiffs, act in any other capacity than as agents from time to time of the Union-Castle Mail Steamship Company, Limited, and the firm of Kayzer, Irvine & Co., and that it was known to the plaintiffs that in all their dealings with these answering defendants, these answering defendants acted not, as principals, but as agents as aforesaid.

The answering defendants further allege that they did not at any time have any dealings with the plaintiffs in which these answering defendants acted or assumed to act as common carriers.

Wherefore these answering defendants pray that the complaint herein be dismissed, with costs, or that the Court will grant to these answering defendants such other and further relief as the justice of the cause may require.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Attorneys for Answering Defendants.

67 SOUTHERN DISTRICT OF NEW YORK,
State and County of New York, ss:

Herbert Barber, being duly sworn, deposes and says, that he is one of the above-named answering defendants; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to such matters he believes it to be true.

(S'd)

HERBERT BARBER.

Sworn to before me this 9th day of September, 1903.

[SEAL.]

A. M. MENKEL,
Notary Public, Westchester Co.

Certificate filed in N. Y. County.

(Endorsed:) United States Circuit Court, Southern District of N. Y.—Hugo Adelberto Thomsen and others, against Herbert Barber and others, Defendants.—Answer of Herbert Barber and another.—Butler, Notman Joline & Mynderse, Att'ys for Answering

Defendants, 54 Wall Street, New York City.—U. S. Circuit Court, Southern District New York.—Filed Sep. 9, 1903.—John A. Shields, Clerk.

68 United States Circuit Court for the Southern District of New York.

HUGO ADELBERTO THOMSEN and Others, Plaintiffs,
against

EDWARD N. NORTON and SKEFFINGTON S. NORTON, Composing the Firm of Norton & Son, Impleaded with the Union Castle Mail Steamship Company, Ltd., and Others, Defendants.

The defendants Edward M. Norton and Skeffington S. Norton, composing the firm of Norton & Son, answering the complaint herein, by their attorneys, Convers & Kirlin, respectfully show unto this Court, on information and belief, as follows:

First. They admit the matters alleged in the first article of the complaint.

Second. They deny that they have any knowledge or information sufficient to form a belief as to the matters alleged in the second article of the complaint.

Third. They deny that they have any knowledge or information sufficient to form a belief as to the matters alleged in the third article of the complaint.

Fourth. They deny the matters alleged in the fourth article of the complaint.

69 Fifth. They admit that at the time the complaint herein was filed the defendants Sir Donald Currie, Sir Francis Henry Evans, David Martin Currie, Frederick James Mirrielees, George Alexander Keith Wisely, Percy Alport Molteno, Alastair Currie, John Macmartin Currie and Murland Degrasse Evans were, and they still are, copartners doing business under the firm name of Donald Currie & Co., but they deny that they have any knowledge or information sufficient to form a belief as to the other matters alleged in the fifth article of the complaint.

Sixth. They deny that they have any knowledge or information sufficient to form a belief as to the matters alleged in the sixth article of the complaint.

Seventh. They deny that they have any knowledge or information sufficient to form a belief as to the matters alleged in the seventh article of the complaint.

Eighth. They admit that at the times mentioned in the complaint Edward N. Norton and Skeffington S. Norton were copartners doing business under the firm name of Norton & Son, and they admit that at the time this action was instituted they were agents for Donald Currie & Co., for the purpose of representing them in this action, but they deny the other matters alleged in the eighth article of the complaint.

Ninth. They deny that they have any knowledge or information

sufficient to form a belief as to the matters alleged in the ninth article of the complaint.

Tenth. They deny the matters alleged in the tenth article of the complaint.

70 Eleventh. They admit that as agents they issued to merchants trading in this port and South African ports, among whom are the complainants, on request by them, a printed circular, of which what purports to be a copy is annexed to complaint, marked Exhibit A, but for greater certainty as to the terms of the said circular they refer to one of the said circulars. These defendants deny the other matters alleged in the eleventh article of the complaint.

Twelfth. They deny the matters alleged in the twelfth article in the complaint.

Thirteenth. They deny the matters alleged in the thirteenth article of the complaint.

Fourteenth. They admit that they issued as agents, on or about December 1, 1901, a printed circular, of which what purports to be a copy is annexed to the complaint, marked Exhibit B, but for greater certainty as to the terms of said circular, these defendants refer to the said circular. These defendants deny the other matters alleged in the fourteenth article of the complaint.

Fifteenth. They deny the matters alleged in the fifteenth article of the complaint.

Sixteenth. They deny the matters alleged in the sixteenth article of the complaint.

Seventeenth. They deny the matters alleged in the seventeenth article of the complaint.

Eighteenth. They deny that they have any knowledge or information sufficient to form a belief as to the matters alleged in the eighteenth article of the complaint.

71 Nineteenth. They deny the matters alleged in the nineteenth article of the complaint.

Twentieth. They admit that they as agents issued a printed circular, of which what purports to be a copy is annexed to the complaint and marked Exhibit C, but for greater certainty as to the terms of the said circular, these defendants refer to one of the said circulars. These defendants deny that they have any knowledge or information sufficient to form a belief as to the copy marked Exhibit D and annexed to the complaint, and they deny the other matters alleged in the twentieth article of the complaint.

Twenty-first. They deny that they have refused to pay to the plaintiffs certain commissions claimed as rebates by the plaintiffs, but they deny the other matters alleged in the twenty-first article of the complaint.

Twenty-second. They deny that they have any knowledge or information sufficient to form a belief as to the matters alleged in the twenty-second article of the complaint.

Twenty-third. They deny the matters alleged in the twenty-third article of the complaint.

Twenty-fourth. They deny the matters alleged in the twenty-fourth article of the complaint.

Twenty-fifth. They deny the matters alleged in the twenty-fifth article of the complaint.

Twenty-sixth. They deny the matters alleged in the twenty-sixth article of the complaint.

Twenty-seventh. They deny the matters alleged in the twenty-seventh article of the complaint.

72 Twenty-eighth. Further answering, and as a separate and distinct defense herein, these defendants allege that any and all cargo that was carried for the plaintiffs by any of the defendants for whom these defendants acted as agents, or that was shipped by the plaintiffs on any vessel or vessels owned or operated, in whole or in part, between New York and South African ports, by any of the defendants for whom these defendants acted as agents, were shipped and carried in each instance pursuant to one or more bills of lading, each of which contained on its face a statement of the amount of freight to be paid for the carriage of the said goods, and in which, and with respect to which, in every such instance, the plaintiffs either paid the freight at once, or agreed with these defendants as agents, or with the defendants for whom these defendants acted as agents, to pay the quantity of freight stated in said bill of lading. And, further, in each and every instance the plaintiffs on receipt of each of the said bills of lading gave to these defendants as agents, or to the defendants for whom these defendants acted as agents, a due bill promising to pay on demand or within a short specified time thereafter the amount of freight specified on the said bill of lading, and in each and every instance the plaintiffs subsequently did make the payments of freight in accordance with the terms of the said bills of lading, and their due bills or promises to pay with respect thereto.

These defendants further allege that any and all payments that were made by the plaintiffs to these defendants, or to the defendants for whom these defendants acted as agents by way of freight for goods which were from time to time carried on a vessel or vessels owned or operated from New York to South African ports, in whole or in part, by the defendants for whom these defendants acted
73 as agents, were made by the plaintiffs pursuant to the terms of the bills of lading that were issued therefor in each instance, and were made freely and voluntarily, and without any protest or reservation of rights on the part of the plaintiffs, and in so far as any of the said payments were made pursuant or with reference to the circulars referred to by the plaintiffs in the complaint as Exhibits A, B, C and D, the plaintiff-co-operated knowingly in the said transaction, and the plaintiffs cannot now be heard to complain of the said transaction, nor are the plaintiffs entitled to any relief on account of payments of freight made by them thereunder.

These defendants further allege that they did not in any transaction in which they may have been concerned with the plaintiffs, act in any other capacity than as agents for the Bucknall Steamship

Line, Ltd., and the firm of Donald Currie & Company, and that it was known to the plaintiffs that in all their dealings with these defendants, these defendants acted not as principals, but as agents as aforesaid.

These defendants further allege that they did not, at any time, have any dealings with the plaintiffs in which these defendants acted, or assumed to act, as common carriers.

Wherefore, these defendants pray that the complaint herein be dismissed, with costs, or that the Court will grant to these defendants such other and further relief as the justice of the cause may require.

CONVERS & KIRLIN,
Attorneys for Defendants Norton & Son.

No. 5 Beekman Street, New York City.

74 SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Edward N. Norton, being duly sworn, says:

I am a member of the firm of Norton & Son, defendants herein. The foregoing answer is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

EDWARD N. NORTON.

Sworn to before me this 4th day of September, 1903.

[SEAL.]

CHARLES R. HICKOX,
Notary Public, New York County.

(Endorsed:)—United States Circuit Court.—Hugo Adelberto Thomsen and others, Plaintiffs, against Edward N. Norton and another, composing the firm of Norton & Son, impleaded with Union Castle Mail S. S. Co., Ltd., and others, Defendants.—Answer of Norton & Son.—Convers & Kirlin, Att'ys for Norton & Son, 5 Beekman St., New York, N. Y.—U. S. Circuit Court, Southern District New York.—Filed Sep. 8, 1903.—John A. Shields, Clerk.

75 At a Stated Term of the Circuit Court of the United States for the Southern District of New York, Held at the Court Rooms thereof in the Post-Office Building, Borough of Manhattan, in the City of New York, on the 29th Day of December, 1906.

Present: Honorable E. Henry Lacombe, Justice.

HUGO ADELBERTO THOMSEN, GUSTAV A. FEDDERSON, HEINRICH Johannes Reidel, and Edward H. Muller, Composing the Firm of Thomsen & Co., Plaintiffs,

against

UNION-CASTLE MAIL STEAMSHIP COMPANY, LIMITED; SIR CHARLES W. Cayser, Charles W. Cayser, Jr.; August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock, and John Percival, Composing the Firm of Cayser, Irvine & Co.; Bucknall Steamship Lines, Limited, and Others, Defendants.

Order.

On reading and filing the annexed consent of Butler, Notman & Mynderse, attorneys for the defendants herein and the annexed consent of Cayser, Irvine & Co. and of Barber & Company, and on motion of J. Parker Kirlin, it is

Ordered, that J. Parker Kirlin be, and hereby is, substituted as attorney for the defendants Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock and John Percival, composing the firm of Cayser, Irvine & Company; Herbert Barber and James Barber, composing the firm of Barber & Co., in place of Butler, Notman & Mynderse herein.

E. HENRY LACOMBE.

Circuit Court of the United States, Southern District of New York.

HUGO ADELBERTO THOMSEN, GUSTAV A. FEDDERSON, HEINRICH Johannes Reidel, and Edward H. Muller, Composing the Firm of Thomsen & Co., Plaintiffs,

against

UNION-CASTLE MAIL STEAMSHIP COMPANY, LIMITED; SIR CHARLES W. Cayser, Charles W. Cayser, Jr.; August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock, and John Percival, Composing the Firm of Cayser, Irvine & Co.; Bucknall Steamship Lines, Limited, and Others, Defendants.

We hereby consent to the substitution of J. Parker Kirlin, Esq., as attorney herein for the defendants Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock and John Percival,

- 77 composing the firm of Cayser, Irvine & Company, Herbert Barber and James Barber, composing the firm of Barber & Co., and the entry of an order thereon.

Dated, New York, December 26, 1906.

BUTLER, NOTMAN & MYNDERSE,
Attorneys for Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock, and John Percival, Composing the Firm of Cayser, Irvine & Co., and Herbert Barber and James Barber.

CAYZER, IRVINE & CO.,
By HERBERT BARBER, Agent,
BARBER & CO.,
By HERBERT BARBER.

(Endorsed:) United States Circuit Court, Southern District of N. Y. Hugo A. Thomsen, etc., Plaintiffs, against Union Castle Mail S. S. Co., Ltd., etc., Defendants. Order. Convers & Kirklin, Attorneys for Defendants, 27 William Street, New York, N. Y. U. S. Circuit Court, Southern District, New York. Filed Dec. 29, 1907. John A. Shields, Clerk.

- 78 At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms in the Borough of Manhattan, in the City of New York, on Monday, the 19th Day of April, in the Year of Our Lord One Thousand Nine Hundred and Nine.

Present: The Honorable John R. Hazel, Judge.

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HUGO ADELBERTO THOMSEN et al.

VS.

UNION CASTLE MAIL S. S. Co. et al.

Now come the plaintiffs, by Hugh A. Bayne, Esq., and Lorenzo Ullo, Esq., their attorneys, and move the trial of this cause. Likewise come the defendants, by J. Parker Kirlin, Esq., and Thomas Thacher, Esq., their attorneys. Thereupon a jury is impanelled and the cause proceeds to trial.

Thereafter, on Thursday, the 22nd day of April, 1909, after hearing the evidence for the plaintiffs and the arguments of counsel and, on motion of Thomas Thacher, Esq., attorney for defendants, the Court proceeds to dismiss the complaint as against the defendants, the Bucknall Steamship Lines, Ltd., and the Union Castle Mail S. S. Co. Likewise, on Friday, the 23rd day of April, 1909, after hearing the evidence for the defendants and the arguments

79 of counsel, and, on motion of J. Parker Kirlin, Esq., attorney for the defendants, the Court dismisses the complaint as against the defendants, Donald Currie & Co.

Thereupon, after hearing the charge of the Court, the jury retire in charge of an officer duly qualified to attend them, and on their return say they find a verdict in favor of the plaintiffs, in the sum of \$5,600, with interest from June 9th, 1903. Thereupon the Court directs that the amount of judgment be made three times the amount of the verdict.

The Court further, denies Mr. Kirlin's motion to set aside the verdict and for a new trial, and grants the defendants a stay of 60 days after entry of judgment.

The Court further directs that the counsel fees of plaintiff's attorneys be fixed at the sum of \$1,000 in consideration of the first trial and the taking of an appeal; and also the further sum of \$1,500 in consideration of the present trial.

An extract from the minutes.

JOHN A. SHIELDS, *Clerk.*

80 At a Stated Term of the United States Circuit Court, for the Southern District of New York, held at the Court Rooms thereof, in the Federal Building, in the County of New York, on the 28th Day of April, 1909.

Present: Hon. John R. Hazel, Circuit Judge.

HUGO ADELBERTO THOMSEN, GUSTAV A. FEDDERSON HEINRICH Johannes Riedel, and Edward H. Muller, Composing the Firm of Thomsen & Co., Plaintiffs,

against

UNION CASTLE MAIL STEAMSHIP COMPANY, LIMITED; SIR CHARLES W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock, and John Percival, Composing the Firm of Cayser, Irvine & Co.; Bucknall Steamship Lines, Limited; Sir Donald Currie, Sir Francis Henry Evans, David Martin Currie, Frederick James Mirrielees, George Alexander Keith Wisely, Percy Alport Molteno, Alastair Currie, John MacMartin Currie, and Murland De Grasse Evans, Composing the Firm of Donald Currie & Company; Herbert Barber and James Barber, Composing the Firm of Barber & Co.; Edward N. Norton and Skeffington S. Norton, Composing the Firm of Norton & Son, Defendants.

81 The issues in this action having been brought on for trial before Hon. John R. Hazel, Circuit Judge, and a jury, at a Stated Term of the United States Circuit Court for the Southern District of New York, in the Court House thereof, in the Borough of Manhattan, City, County and State of New York, on the 19th day of April, 1909, and the said trial having proceeded from day to day thereafter on the 20th, 21st, 22nd and 23rd days of April, 1909, and all the parties to the action having duly appeared, and being then and there duly represented by their respective counsel, and testimony having been offered on behalf of plaintiffs and defendants, and the issues having been then and there duly tried, and

the action having abated as against defendants Sir Donald Currie and Sir Francis Henry Evans, by reason of their death, and the complaint having been dismissed by the Court as against the defendants Union Castle Mail Steamship Company, Ltd., Bucknall Steamship Lines, Ltd., and David Martin Currie, Frederick James Mirrielees, George Alexander Keith Wisely, Percy Alport Molteno, Alastair Currie, John MacMartin Currie and Murland De Grasse Evans, of the firm of Donald Currie & Co., and it appearing from the complaint and the testimony given at the said trial, that this action was brought to recover damages for injury to plaintiff's business and property under the Act known as the Act of Congress of July 2nd, 1890, Chapter 647, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and pursuant to Provisions of Section 7 of the said Act, by which any person who shall be injured in his business or property, by any other person or corporation, by reason of anything forbidden or declared to be unlawful by the said Act, may sue therefor in any Circuit Court of the United States, in the District in which the defendants reside or are found, and shall recover threefold the damages by such persons sustained, together with the costs of suit, including the reasonable attorneys' fees; and after said issues had been duly tried, a verdict for the plaintiffs and against the defendants Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock and John Percival, composing the firm of Cayser, Irvine & Co.; Herbert Barber and James Barber, composing the firm of Barber & Co.; and Edward N. Norton and Skeffington S. Norton, composing the firm of Norton & Son, having been duly rendered by the jury on the 23rd day of April, 1909, for the sum of Fifty-six hundred (\$5,600) Dollars and interest thereon from the 9th day of June, 1903, to the said 23rd day of April, 1909, to wit, One thousand nine hundred seventy-three and 06/100 (\$1,973.06) Dollars, making Seven thousand, five hundred seventy-three and 06/100 (\$7,573.06) Dollars, and the Court having thereupon directed the Clerk to treble the amount of said verdict, pursuant to the provisions of said Act, which verdict so trebled, amounts to Twenty-two thousand seven hundred nineteen and 18/100 (\$22,719.18) Dollars, and it being thereupon consented by counsel for the respective parties that the Judge should fix the amount of reasonable attorneys' fee, pursuant to the provisions of said Act, without proof, and the Judge having thereupon fixed the same at the sum of Twenty-five hundred (\$2,500) Dollars, and the costs of the said plaintiffs having been duly adjusted at the sum of Seventy and 72/100 (\$70.72) Dollars,

Now on motion of Ullo, Ruebsamen & Yuzzolino, attorneys for the said plaintiffs, it is hereby

Ordered and adjudged, that the plaintiffs Hugo Adelberto Thomsen, Gustav A. Fedderson, Heinrich Johannes Riedel, and
 83 Edward H. Muller, recover against the defendants Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock, and John Percival, composing the firm of Cayser,

Irvine & Co.; Herbert Barber and James Barber, composing the firm of Barber & Co., Edward N. Norton and Skeffington S. Norton, composing the firm of Norton & Son, the sum of Twenty-two thousand, seven hundred nineteen and 18/100 (\$22,719.18) Dollars, being threefold the damages sustained by plaintiffs, as found by the jury, together with Twenty-five hundred (\$2,500) Dollars, the amount fixed by the Court as above stated, as the reasonable attorneys' fee, with Twenty-one (\$21) Dollars interest from the 23rd day of April, 1909, to this date, and Seventy and 72/100 (\$70.72) Dollars, the amount of plaintiffs' costs as taxed; amounting in all to the sum of Twenty-five thousand, three hundred and ten and 90/100 (\$25,310.90) Dollars, and that execution issue against the said defendants accordingly.

Judgment signed and entered this 28th day of April, 1909.

[SEAL.]

JOHN A. SHIELDS, Clerk.

(Endorsed:) United States Circuit Court, Southern District of New York. Hugo Adelberto Thomsen et al., Plaintiffs, against Union Castle Mail Steamship Company, Ltd., et al., Defendants. Judgment. Ullo, Ruebsamen & Yuzzolino, Attorneys for Plaintiffs, No. 11 Broadway, New York City. U. S. Circuit Court, Southern District N. Y. Filed Apr. 28, 1909. John A. Shields, Clerk.

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Bill of Exceptions.

United States Circuit Court, Southern District of New York.

HUGO ADELBERTO THOMSEN, GUSTAV A. FEDDERSON, HEINRICH Johannes Riedel, and Edward H. Muller, Composing the Firm of Thomsen & Co., Plaintiffs,

against

UNION CASTLE MAIL STEAMSHIP COMPANY, LIMITED; SIR CHARLES W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock, and John Percival, Composing the Firm of Cayser, Irvine & Co.; Bucknall Steamship Lines, Limited; Sir Donald Currie, Sir Francis Henry Evans, David Martin Currie, Frederick James Mirrielees, George Alexander Keith Wisely, Percy Alport Molteno, Alastair Currie, John MacMartin Currie, and Murland De Grasse Evans, Composing the Firm of Donald Currie & Company; Deutsche Dampfschiffahrts, Gessellschaft, Hansa; Herbert Barber and James Barber, Composing the Firm of Barber & Co.; Edward N. Norton and Skeffington S. Norton, Composing the Firm of Norton & Son; Henry W. O. Edye, William Volckens, Paul Gottheil, and William L. Walther, Composing the Firm of Funch, Edye & Co., Defendants.

Bill of Exceptions.

Afterwards, to wit, on April 19th, 20th, 21th, 22nd, and 23rd, 1909, at a Stated Term of this Court held at the Post Office

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Building in the Borough of Manhattan, City of New York, the issues in this case duly came on to be tried before the Honorable John R. Hazel, District Judge.

The plaintiffs, Hugo Adelberto Thomsen, Gustav A. Feddersen, Heinrich Johannes Riedel and Edward H. Muller, composing the firm of Thomsen & Co., appeared by Ullo, Ruebsamen & Yuzzolino, their attorneys, and Hugh A. Bayne and Lorenzo Ullo, of counsel.

The defendants, Union Castle Mail Steamship Company, Limited, Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock, and John Percival, composing the firm of Cayser, Irvine & Co.; Bucknall Steamship Lines, Limited, Sir Donald Currie, Sir Francis Henry Evans, David Martin Currie, Frederick James Mirrielees, George Alexander Keith Wisely, Percy Alport Molteno, Alastair Currie, John MacMartin Currie, and Murland De Grasse Evans, composing the firm of Donald, Currie & Company; Herbert Barber and James Barber, composing the firm of Barber & Co.; Edward N. Norton and Skeffington S. Norton, composing the firm of Norton & Son, appeared by Convers & Kirlin, their attorneys, and J. Parker Kirlin, Thomas Thacher, and Charles R. Hickox, of counsel.

A jury was empanelled and sworn and the following proceedings were then had.

Mr. Bayne opened the case for the plaintiffs.

EDWARD N. NORTON, called as witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination by Mr. BAYNE:

I am one of the defendants in this action. I am a member of the firm of Norton & Son, composed of Edward N. Norton and Skeffington S. Norton. That firm so existed between January, 1899, and June, 1903.

Q. During that period you were agents of the Bucknall Steamship Lines, Limited, and Messrs. Donald Currie & Company, were you not?

A. From what period?

Q. During the period from January, 1899, to June, 1903?

A. January, 1899. The Bucknall Steamship Lines were incorporated on November 15, 1900. Prior to that it was Bucknall Brothers.

Q. Was that the Bucknall Steamship Lines, the successor of Bucknall Brothers?

A. I could not say whether they were successors or not; the Bucknall Steamship Lines were incorporated then and took in Bucknall Brothers business and what other business I could not say.

Q. But you during that period were agents of Donald Currie & Company?

A. Yes, sir.

Q. That is a firm composed of members as named in the complaint?

A. Yes, sir.

The Bucknall Steamship Lines, Limited, as I say, was incorporated November 15, 1900; then they commenced working the South African line.

Q. Were the steamers which composed that line when it was incorporated the same steamers which had been previously engaged in this trade with South Africa?

A. As to names I could not say; they sometimes chartered a steamer and sometimes put on their own boat; the names varied; they were not regular boats engaged in the trade.

Q. Were any of the steamers the same steamers which had been previously engaged in that trade?

A. I do not recollect.

During the period in question the steamers of the lines I have mentioned engaged in the trade of carrying freight from
87 New York to South Africa under the name of American and South African Steamship Line. That was a trade-mark, and included the lines just referred to. During that period the Union Castle Mail Steamship Company, Limited, one of the defendants, the Cayser, Irvine & Company, were engaged in carrying freights between New York and South African ports. The agents in New York of the Union Castle Steamship Company, Limited, and Cayser, Irvine & Company were Messrs. Barber & Company, Limited, incorporated, I think. I presume so. I have dealt with Barber & Company as their agent. During that period the lines which our firm represented in carrying freight between New York and South African ports and the lines which Barber & Company represented in the same trade did not compete with one another in that trade.

Q. Is it not a fact that during that period they, by agreement between themselves, carried freights at uniform tariff rates?

A. To my best recollection that was the situation, those tariff rates.

We collected rates for the ship lines we represented during that period.

Q. And you made Messrs. Barber & Company conform as to what freights should be charged, didn't you, apparently?

A. No, sir; the rates were made in London. We were merely instructed to charge certain rates.

I know the fact that the rates charged by the Barber & Company's lines were the same as our rates during that period.

Q. Was there any written agreement relevant to the carriage of freight between the lines that I have mentioned?

A. I could not say; to my recollection there must have been some arrangement or agreement on the other side.

Q. Were you not furnished, as agent, with a copy of such
88 agreement?

A. No, sir; not to my recollection.

Q. Did you have in your possession at any time during the period I have referred to, namely, from January, 1899, to June, 1903, any copy of any purported agreement between them?

A. I do not recollect it, sir. If we did I have not been able to find it.

I looked through my papers, but I could not find any such agreement. The correspondence that is called for in the subpoena I had to leave to my partners to cull out, my younger partners, because I

was not able to prepare it; there were some two thousand letters, and only a small proportion of those related to the subject called for.

Q. Whether there was any written agreement or not, you know, as agent of these companies that they carried freight at uniform rates and that they did not compete with one another?

A. They did not.

Q. Don't you also know that that was the result of an agreement between them?

A. It must have been the result of some agreement or arrangement, naturally.

Q. I show you a paper and ask you if you have in your possession any paper like that (handing paper to witness)?

A. We may have, but I have not been able to find any such paper. I would like to make the statement here, I have not been in active business for three or four years; I want to tell you that. My younger partners have attended to the active part of the business for the last two or three years.

Q. Isn't it a fact that the lines in question not only did not compete with one another but they fixed uniform rates and they also pooled rates between themselves?

A. That I could not say.

89 Q. Have no statements of that kind ever been made to you by any of these defendants?

A. Not to my knowledge; there may have been something written to that effect, but I could not say, I do not recollect about it; it may have been pooled or it may not, I do not recollect anything about that.

Q. As a matter of history relative to this subject, and speaking now of a period antedating January 1, 1899, isn't it a fact from 1893 on to 1903 the lines that were represented by your firm and lines that were represented by Barber & Company, carried freight at uniform rates that did not compete with one another?

A. That was the situation as I remember it.

Q. I am referring, of course, to the trade between New York and South African ports?

A. I understand.

Q. During the period from December 31, 1898, to June, 1903, did you, on behalf of the lines you represented, issue any circulars to shippers?

A. I presume so; I cannot recollect. Probably if I saw them I could identify them.

Q. I ask if the paper I now hand you is not a circular that was issued by your firm on behalf of the lines you represented (handing paper to witness)?

A. Yes, sir. This is a circular that was printed and dated in London and issued from London; some of them might have gone through our office, I presume they did.

Q. Isn't it a fact you did issue to shippers from your office circulars of that character?

A. These circulars were sent to us from London and we always

had a stock, and in case shippers inquired for them we gave them. We did not send them out to shippers promiscuously.

90 Mr. BAYNE: I offer in evidence the paper identified by the witness and ask that it be marked Plaintiff's Exhibit A.

Mr. THACHER: I suppose, your Honor, this is done only for the purpose of showing what happened after December 31, 1901; otherwise we object to it. * * * The Seventeenth paragraph is the first attempt to state any damage to this plaintiff by any one. The Seventeenth paragraph begins, "That by reason of the monopoly so created and maintained by all the defendants herein." I want to call your special attention to that. * * * All the defendants include the Hansa. According to the allegation it was not until December, 1901, that the Hansa came in. A monopoly so created and maintained by all the defendants, including the Hansa, could not have existed until after Hansa came into that combination, and therefore, I insist and shall insist throughout the trial that no damage except damage caused by some illegal combination to which the Hansa was a party and was the combination alleged in the complaint as so created by all of the defendants, Hansa included, in December, 1901, that only damages growing out of that combination within the pleadings in this case can be the subject of investigation. And furthermore we answered, no damage by reason of anything that took place before that so-called monopoly was so created and maintained by the defendant, can have any place in this case. In other words, on both points as to what is the illegal combination which is charged in this complaint I believe your Honor will find, if you will simply read the Seventeenth section and then read back, it is a combination formed in 1901. Now, if this testimony with reference to Exhibit A be introduced only to make the preceding history in order to show what combination was

91 formed in 1901, then I understand we have no particular objection; but we do insist that it must be introduced and accepted in evidence only with the understanding that it becomes material as the basis to make clear the effect of the proof with respect to a combination formed in December, 1901, the complaint being limited by its allegations to claiming damages by reason of such a combination so created and maintained by all of the defendants in December, 1901, and damages by reason of something, whatever it may be, which necessarily took place after December, 1901. In other words, that we have not anything to do with regard to the combination except the combination formed in December, 1901, to which the Hansa was a party, and we have not anything to do with damages except damages that resulted from certain facts which might be proved occurring between December, 1901, and August, 1902, if we accept the statement of the opening.

The COURT: Quite likely that is true; but this is a step in the transaction.

Mr. BAYNE: If your Honor please, let me say this, at the last trial the same objection was raised as to this. In order to meet it we at once discontinued against Hansa, so Hansa is not in it as a

defendant. Now he seeks to claim the allegation means Hansa included.

The COURT: There really was no unlawful combination until Hansa came in?

Mr. BAYNE: Yes; there was from 1893 on; Hansa joined it later.

The COURT: I understand the other side's contention is no unlawful combination by which you claim.

Mr. BAYNE: That is right.

The COURT: And you have no right to claim damages
92 until Hansa came in. Hansa is not a defendant here now.

Mr. BAYNE: Hansa is not a defendant now. If there is any question about it I will ask your Honor to permit me to amend Paragraph Seventeenth of the complaint as follows: second line, omit the word "all," so that it reads "That by reason of the monopoly so created and so maintained by the defendants herein" except the Hansa line and Funch, Edye & Company prior to November 1, 1901, and by such defendants, with the Hansa Company and Funch, Edye & Company, ever since said date, "the merchants in the United States," etc., as the original allegation stands, omitting the word "all" before the word "defendants" on the lower line, and wherever it occurs in that paragraph. That is no surprise to them. They know perfectly well the discontinuance was made in order to meet this objection so Hansa should not be a defendant, and an order was made to that effect. This amendment being necessary is no surprise.

Mr. KIRLIN: If your Honor please, we entertain a very strong objection to these amendments. At the former trial this question came up, and Dr. Ullo, who was then trying the case, asked me to discontinue as to the Hansa line and Funch, Edye & Company, and the motion was granted. It was pointed out to the Judge at that time, the Judge then trying the case, Judge Hough, that the motion did not embody any request to change the pleading; that is to say by discontinuing as to Hansa there was no change made by the amendment then allowed by the Court in the body of the complaint, which alleged that the combination complained of had
93 been entered into in 1901, at the time Hansa entered it, and for that reason we made no objection to the amendment.

We had made our preparations for trial and we were satisfied to proceed as it was. Now the same question is presented here, and although this case has been on the calendar for some seven or eight months the plaintiffs for the first time present an application to amend their complaint. This action has been pending for four or five years—six years. All the defendants except the agents are non-residents, all of them are abroad, none of them are here, and we have no opportunity to consult them on the subject that we might be called upon to prepare for as stated in the complaint. We are not prepared to deal with any combination of which the plaintiffs complain that they were damaged except the combination set out in the complaint itself, and if this amendment should be allowed we should certainly ask your Honor to postpone this trial, allow us to withdraw a juror, and consult with our clients in

regard to meeting the additional charge. If your Honor has a copy of the printed book before you you will observe what took place on the motion to discontinue as to Hansa at pages 139, 140 and 141.

The COURT: How do you claim to be surprised in view of this matter before Judge Hough, and in view of the fact that it was there understood that the combination would be inserted right from the inception?

Mr. BAYNE: Precisely so; that was the only object of discontinuing against Hansa, and it was so understood.

Mr. KIRLIN: Just the contrary, as your Honor will see here. We raised the point before the Judge as to whether our discontinuing against Hansa would alter the substantial allegations in the body of the complaint, and the Judge said he understood they did not.

The COURT: Let me see if I understand. The claim of the plaintiffs is that the original combination was formed between the Bucknall Steamship Company and the Union Castle Mail Steamship Company.

Mr. BAYNE: All four of the lines except Hansa were in it from start to finish; Hansa came in later. Damages are claimed from a period when Hansa was not in. They are seeking to make "all the defendants" mean Hansa too. We will show that Hansa was one of the conspirators for part of the time, but we will not ask damages against Hansa but only seek damages against those who were all the time in the conspiracy. We can proceed against one tortfeasor. At page 141 of the printed record the Judge states: "If there be any element of surprise in that to the other defendants I am not aware of it. I cannot myself see it from my reading of the complaint." It was only to give the expression the meaning without Hansa. They try to limit us by the use of the word "all" and say "all of the defendants." We have discontinued as to Hansa. We do not include Hansa. I do not think an amendment is necessary, but if necessary it certainly is no surprise. The testimony taken at the last trial after discontinuance related to damages after Hansa came into the combination. The case went on on that theory.

Mr. KIRLIN: May I read this, your Honor, as my friend did not take part in that trial. We do not dispute the proposition at all that one tortfeasor may be sued for damages committed by a number of conspirators, but when the complaint alleges that a number of conspirators who caused the damage consisted of A, B, C and

95 D, and operated from 1891, it does change the essential allegation that the damage was committed by A, B, C and D, unless he discontinues as to D and unless he withdraws that part of the complaint which states that D was one of the conspirators. That was exactly the point which was presented to the Judge; and after a colloquy which appears on page 140, and right after the passage of the Judge's opinion to which my friend has just adverted, this took place:

"Mr. THACHER: In other words, the action would not amend the complaint at all—the complaint stands as it is.

"The COURT: Yes.

"Mr. THACHER: Only as if they had alleged precisely what they do allege here, and brought their suit against these other defendants.

"The COURT: Exactly so. The motion is granted, and the action as to the Hansa Line and Funch, Edye & Company is discontinued, upon payment of costs."

In other words, the complaint stood as though it had alleged as it did allege that the combination which permitted the damage complained of was formed by the admission of Hansa in 1901, and Hansa was one of those whose acts produced the damages and it was only for the damage, caused after Hansa became a member of the combination for which recovery was sought. Now, the fact that he chose to proceed to recover his damages against the other three only did not alter the essential averment in the complaint that the combination complained of was one of which Hansa was a party. Now, therefore, we prepared to try the case averred in the complaint as beginning, so far as these defendants are concerned with
96 1901. We have not prepared at all with what preceded that, and on that we have a right to be heard and our clients have a right to be prepared. If this motion is pressed, we are not prepared for it.

The COURT: I cannot see how you are surprised in any way. The motion is granted.

Mr. KIRLIN: May we have an exception to your Honor's allowing it, and may be also make a formal request that a juror be withdrawn so that we be prepared to meet this additional charge?

The COURT: Denied.

Mr. KIRLIN: Exception by defendant. Are we not to have some opportunity to plead to this additional charge? We do not even know what it is.

Mr. BAYNE: It is denied by the answer as I understand.

The COURT: As I understand, it merely eliminates damages against Hansa and retains Hansa as one of the alleged co-conspirators. I cannot perceive how you can possibly be injured in any way by the amendment.

Mr. KIRLIN: I understand the purpose of the amendment was to include a claim for damages that arose before Hansa came into the combination. Therefore, it presents a new claim which did not exist under the original complaint; that is, it presents a claim against parties—

The COURT: The original complaint as to damages from the very beginning of this so-called conspiracy.

Mr. KIRLIN: No, sir; it only claims damages from a combination after Hansa became a party.

Mr. BAYNE: That is not right, your Honor.

The COURT: Refer to the bill.

Mr. BAYNE: The complaint alleges one of the illegal acts done by the defendants was the issuing of a circular dated December 31, 1898. The damages are claimed for the illegal action
97 complained of, among them the issuing of that circular and

the exacting of forfeit money. It turns out Hansa did not join the combination until later, and we discontinued as to that. They have denied any of them were ever in it, and that covers the amendment as well as the original allegations.

MR. THACHER: There was not any allegation of damage before 1901.

MR. BAYNE: December, 1901, is not mentioned in the complaint at all.

MR. THACHER: Will your Honor hear me on that? There is not one word of that until you get to the Seventeenth paragraph. * * * If you look all through the statements between, beginning with the Seventeenth to the end of the complaint, you will find no reference whatever to anything which is alleged as having taken place prior to December 31, 1901, and the damages to be collected, if any, are those which occurred after that time, and we object to allowing the complainants at this stage to amend their complaint. * * * It is a very substantial, a very material change. It leads to an investigation from 1898 to 1901, a period of three years, to investigate and find out the scraps of evidence that bears on it, and I think we have a right to insist that there shall be no such amendment unless we have a right to consider deliberately and plead to the amended complaint.

THE COURT: Do you claim to recover damages prior to 1901?

MR. BAYNE: We certainly do, and in paragraph Eleventh of the complaint we allege conspiracy, "That at some time prior to December in the year 1898, and at a time when the transportation trade," etc., we allege these various defendants were engaged in an illegal conspiracy in restraining trade; that they distributed a circular, which we annexed to the complaint.

THE COURT: Where is the allegation of the answer denying it?

MR. BAYNE: The allegation of the answer is, denying it.

THE COURT: I will allow the amendment.

MR. KIRLIN: Will you let us know what the complaint is now?

THE COURT: State the amendment you propose on the record as it was read under your proposed amendment.

MR. BAYNE: Plaintiff's counsel moves to amend paragraph Seventeenth of the complaint so as to read as follows:

"Seventeenth. That by reason of the monopoly so created and [all]

maintained by \wedge the defendants herein, *except the Hansa line and Funch, Edye & Company, prior to November, 1901, and by said defendants together with the Hansa line and Funch, Edye & Company ever since November, 1901*, the merchants in the United States doing business in the exporting trade to South African ports, among whom are these complainants, have been restrained from trading freely with said ports, through such carrier or carriers as offer the best and most reasonable facilities and inducements, but have been compelled to submit to the hardships and inconvenience

[all of]

of the monopoly created and maintained by \wedge the said defend-

[herein]

ants [^] *as aforesaid*, and to pay the higher rates of freight as aforesaid; and by reason of their compulsory submission to the monopoly so unreasonably, unwarrantably and unlawfully created and [all] [herein]

99 maintained by [^] the *said* defendants, [^] *as aforesaid*, the [payment]

same have been enabled to compel [^] *payments* from the various shippers to South African ports, among whom are the complainants, of large amounts of freight paid at the time of shipment on the basis of the higher unreasonable and unlawful rates fixed by the *said* defendants, as above set forth, and to such an extent as to leave at the present time in defendants' possession collectively, as complainants are informed and verily believe, about the sum of one million and a half of dollars, or more, representing the extortionate amounts received in excess and made up by the difference between the higher rate exacted and collected at the time of shipment as above [rate]

set forth, and the lower [^] *rates*, alleged by the defendants as aforesaid [rate]

said to be fair and reasonable [^] *rates*, and out of such amount the sum of £1,112 7s. 11d, has been forcibly so received, exacted and extorted from the complainants herein by the *said* defendants."

[The words occurring in the original paragraph and omitted in the amendment are enclosed in brackets. The new matter in the amendment is in italics.]

The COURT: Do the defendants desire to make their answer more specific?

Mr. KIRLIN: Without prejudice to our motion, we state that we desire to have the denials attached to the original paragraph attached to this paragraph as amended.

The COURT: Yes, so ordered.

100 Mr. BAYNE: I offer in evidence the paper identified by the witness in his testimony.

Marked Plaintiffs' Exhibit A.

Mr. KIRLIN: There is one word that ought not to be there; it is the word "companies" on that exhibit.

The COURT: Received without the word "companies" written with a red pencil on the last line. You may ask the witness about the word "companies."

Mr. BAYNE: No, sir; I do not believe it has any importance, so I do not object to your ruling. I will omit it.

Q. Mr. Norton, in order to make it clear as to whether your firm issued to shippers circulars like the circular in question, I call your attention to the Eleventh paragraph of your answer to the complaint, which appears to have been sworn to by you, and which reads as follows: "The answering defendants admit that they authorized the issuance and distribution among merchants trading in this port and South African ports, among whom are the complainants, a printed circular, of which what purports to be a copy, is annexed to the complaint, marked 'Exhibit A.'" Is that a fact? Does that

refresh your memory as to whether you did not in fact issue these circulars to the shippers?

A. I do not remember whether. Let me explain. The circulars were sent to our office. Whether the shippers applied for them or they were sent to the shippers, I do not remember.

Q. At any rate they got to the shippers from your office?

A. From our office, that is right.

Q. Then when you verified your answer and stated that you issued the circulars of this character to the merchants, was your memory fresher on the subject than it is now?

A. Naturally. My attorneys made that and I signed it.

101 Q. The American-African steamship lines referred to in Plaintiff's Exhibit A were the lines that you referred to; were they not?

A. The American-African Steamship; yes, sir.

Q. And the Union Clan?

A. Yes, sir.

Q. And what was a trade name and not a corporate name?

A. Yes, sir. The American and African was a trade name.

Q. And so was the Union Clan Line, was it not?

A. I don't know about that. You will have to ask Mr. Barber.

Q. These two lines, the American and African and the Union Clan lines, include the four lines that are defendants in this action?

Mr. KIRLIN: I object to that.

The COURT: There are only three lines.

Mr. BAYNE: Four.

The COURT: Eliminating the Hansa Line?

Mr. BAYNE: That was five.

Mr. KIRLIN: The witness has already stated the Bucknall Steamship Company was not incorporated until November 15, 1900, and this is dated 1898. The question should be reframed.

Mr. BAYNE: The answer of the witness will be taken as made subject to the witness' statement that the Bucknall Line was not incorporated until November, 1900.

Mr. Bayne reads Plaintiffs' Exhibit A to the jury.

The COURT: Does this exhibit include the exportation as well as importation?

Mr. BAYNE: Yes, sir.

The COURT: The 10 per cent. was only paid upon shipments coming from South Africa to America. If I understand you say there was no rebate on any freight charges on goods to this port?

102 Mr. BAYNE: If there were we have nothing to do with them in this case; they were all shipments from the United States to South Africa.

The COURT: Won't you explain this paragraph 3. Commission was not to be paid to any shipper who shipped goods from South Africa to this country by any other line.

Mr. BAYNE: Paragraph 3 of the exhibit?

Mr. KIRLIN: It means imports to Africa.

Mr. BAYNE: That meant, as I understood it—I think we may agree on that—not only the shipper had to be loyal but the person

to whom he shipped had to be loyal to the combination also, otherwise the 10 per cent. on that shipment to that disloyal man would be forfeited. I understand that in the case of the shipper all the forfeits he had up for the previous months were forfeited if he was disloyal, but if he shipped to a disloyal man it only applied to the 10 per cent. paid on the shipment to the disloyal man.

Q. I show you a paper and ask you whether circulars of that character were not issued by your firm to shippers in the United States (handing paper to witness)?

A. This is similar to the other one. These circulars were printed in London and mailed to us and we issued them to the shippers according to instructions from our principals.

Mr. BAYNE: I offer in evidence the paper identified by the witness. It is conceded that the pencil marks on the paper were not there at the time of the issuance of the circular or of the circular similar thereto.

Mr. KIRLIN: You are not offering the pencil marks in evidence?

Mr. BAYNE: I am not offering the pencil marks in evidence.

Marked Plaintiffs' Exhibit B.

103 Q. I show you a circular and ask if these and similar circulars were issued in the same manner as you have testified regarding Exhibits A and B (handing paper to witness)?

A. Yes.

Mr. BAYNE: I offer in evidence as Exhibit E the circular identified by the witness dated April 18, 1902.

Marked Plaintiffs' Exhibit E.

Q. You kept in your office sheets upon which were shown your net tariff charges, did you not?

A. We did, yes sir.

Q. And you sent out tariff charge sheets occasionally to shippers?

A. Not to my recollection; we kept them in our office as reference to give rates to shippers.

Q. Do you not remember whether you did not send notices to shippers whenever changes were made?

A. We sent them changes in the rates,—that business was all done by heads of department, and I could not state definitely whether the tariff was sent to any shippers or not, but I do not think they were. There was a common meeting place for the steamship agents and the merchants on the Produce Exchange; and on the floor of the Exchange our African department man quoted rates to them. I did not.

Q. Now, when a shipper desired to ship, did you charge him anything in addition to the net tariff rate; did you make him pay anything beyond that tariff rate?

A. I would have to answer you from the tariff book; I do not remember all these details. It is so long ago and I did not work at the trade end.

Q. Before you examine the book, isn't it a fact in each instance

in addition to the net tariff rate the shipper had to pay what you call primage amounting to ten per cent.?

104 A. The rates were all made, for instance say twenty-two shillings and six pence per ton, and to all of these rates there was to be added the primage of 10 per cent.

Q. So when a shipper shipped goods he had to pay 10 per cent. in addition to what you call a net tariff rate?

A. I do not know as you call it a net tariff rate. The rate was a certain rate with 10 per cent. primage.

Q. In Exhibit A there is a statement to the effect that there will be returned to the shipper under certain circumstances a commission of 10 per cent. calculated upon the net amount of freight at tariff rates?

A. As I understand it, that means the rate that was charged with 10 per cent. primage, then there is a commission of 10 per cent. returned to the shippers.

Q. Suppose the freight were \$50 and the primage were \$5, isn't it the fact that you would return to a loyal shipper 10 per cent. upon \$50?

A. I cannot say, but if the rate was \$10 and the primage \$5, making \$15 more, it would be taken off \$15.

Q. You are not sure of that, are you?

A. No, I am not positive of that, but I think that was the way it was worked.

Q. Isn't it the fact that the amount that was returned to the loyal shipper was the exact amount of this so-called primage; is not that the fact?

A. I cannot remember. I think Mr. Lilley in our office would know about what was done in that respect. He is not in court now. I do not know whether my son would know or not. He is in court. Mr. Gulick is the cashier now. Whether Mr. Knight was the cashier when this happened or not I do not know. You can find out about it.

Recess.

105 Mr. KIRLIN: If the Court please, I think we should, perhaps, at an early stage of the trial, suggest the death of Sir Donald Currie, one of the partners in the firm of Donald Currie & Co., which took place about ten days ago. The action, I suppose, would abate as to him.

Mr. BAYNE: Under the Code the action can proceed against the other defendants without regard to the fact of his death. It simply abates as to him.

The COURT: I assume that there will be no objection.

Mr. BAYNE: That is understood.

Q. Just before the adjournment, I asked you the question as to whether the ten per cent. charged as primage was not additional to the net tariff rate; and as to whether in the case of a loyal shipper the amount returned was not the exact amount of this primage; and you gave an answer which I understand you desire to correct; I there-

fore ask you whether the amount which was returned to loyal shippers was not the exact amount of the so-called primage?

A. The exact amount, yes. That was an amount charged in addition to the net tariff rate. I was agent for Bucknall Brothers, whom I have mentioned, from 1893 on. They were in the conference from 1893 on. The freights which were paid to the lines of which I was agent were paid by New York shippers to my firm, and my firm issued the bills of lading. There may have been some exceptions, where the freight was not paid. That was the main practice. The exceptions were that the freight might have been paid in London instead of New York. As I remember it, the plaintiff in this action, Thomsen & Co., when they shipped by the lines of which

I was agent, paid the freight to my firm.

106 Q. About how many shippers were there of goods to South Africa in 1893?

A. I would have to refer to the freight list, but I should judge in the neighborhood of 100. In 1899, in January, I should judge there were 500 or more; and in 1902, about the same I should think.

Q. Have you produced a list of the steamers and the dates of their sailing, that carried goods from New York to South Africa between January 1, 1899, and June 1903?

A. They are on the table there, I think, the books. They are in a book on that table, that I brought with me.

Q. Did you have any instructions from your principals not to accept any goods for shipment unless the shipper paid in addition to the net tariff rate the so-called primage?

A. Not to my recollection.

Q. Did you not testify at the last trial that you were instructed to refuse to take less than tariff rate, plus ten per cent?

A. Those were our instructions, as I remember now. It is a long while ago. That is the natural conclusion I would arrive at. That was our practice. I think I made an exception in my last testimony, except in a very large block of cargo a person might offer 100,000 tons of stuff and they might make a special rate on it. Shippers who came to me here in the ordinary course of business and offered freight to be sent, I charged them, in addition to the net tariff rate, 10 per cent. This was subject to the terms of the circular, Exhibits A and B.

Q. And if a shipper, without the permission of the conference, patronized any competing line, the ten per cent. was not returned to him?

A. The shipper made an application——

Q. Pardon me, is not that right?

A. We did not return it until the return of the application of the shipper to us and they gave us orders to pay it. I knew the
107 practice of my principal in regard to that matter. The practice was that ten per cent. was not returned if they patronized any competing line. The circular so states.

Q. And you were the ones through whom the amounts that were returned were repaid to the shippers in New York? We paid under instructions from the principal in London. Whatever shippers had

to give the ten per cent. originally to me, if they did not patronize other lines would get that ten per cent. back through me. We handled the business. Whatever the principals instructed us to do we carried it out. I could not state how much was collected as ten per cent. beyond the net tariff rate during the period from 1899 to 1903.

By the COURT:

Q. Can you give us the rough figures?

A. No.

Q. You paid that ten per cent. to all the common carriers?

A. It went through our office on instructions from London.

Q. Not only to representatives of Bucknall Brothers, but all these corporations?

A. No, sir, only for the lines we represented.

By Mr. BAYNE:

Q. From April, 1899, until June, 1901, were there any regular lines of steamers engaged in the carriage of freight from New York to South Africa except the lines represented by you and the lines represented by Barber & Co.?

A. I could not tell you the dates; I don't remember. Prior to the entry of the Hansa Line into the trade and between 1899 and the time the Hansa Line came in, there were no regular lines of steamers engaged in the trade except the AA and the Union, the lines represented by my firm and those represented by Barber & Co. They were all called conference lines. By conference

108 I mean they conferred together to the end of maintaining the service and agreeing on rates of freight; fixing rates of freight to work the business. As far as I know they also conferred together relative to dealing with tramp steamers when they entered into competition.

Q. And when the tramp steamers entered the competition, did they do anything for the purpose of putting them out of the competition, that you know of?

A. They naturally continued to work the business on their tariff rates as they had done. One of the objects of the conference was to keep tramp steamers from coming in, or any other opposition.

Q. Did not the Hansa Line come into competition with the conference lines about June 15, 1901?

A. I presume that is the date. The record shows the date. Mr. Kirlin has it there. Is that date correct?

Q. Can you refresh your memory from a paper giving the list of ships that sailed and tell us when the first Hansa ship sailed (handing witness paper)?

A. This does not give the lines, does it? No, I cannot recognize the names of the ships. I guess the dates are all right.

By Mr. KIRLIN:

Q. There are the 1901 sailings (handing witness a paper)?

A. The Nowenfeldts, I think, July 11th. Is there not one previous to that?

Q. 1901?

A. One of the "feldts."

By Mr. BAYNE:

Q. I asked you the question as to when the Hansa Line first entered into competition with the conference lines in this South African trade?

A. I do not remember the date.

Q. Don't you find the date that one of the ships sailed?

109 A. I think the Nowelfeldts. I don't see anything showing that the Hansa sailed July 11th. Prior to that, the Hansa Line had been making freight contracts.

Q. So they had made offerings of freight prior to July 11, 1901, when their first ship sailed?

A. Oh, yes; I can't remembered the names. I could say, safely, I think, that they were engaged in accepting freight for that trade in June, 1901, since their first ship sailed July 11, 1901.

Q. Was it not just prior to November 1, 1901, that the Hansa Line entered the conference?

A. That is a matter of record. I don't remember the date.

Q. I show you Plaintiff's Exhibit B, dated November 1, 1901, which purports to be signed by the Hansa Steam Navigation Company, Bremen, and ask you whether that is not the date the Hansa Line entered the combination?

A. Yes, about the date, November 1st. My answer is that on November 1, 1901, the Hansa Line was in the conference, according to that circular. I don't remember how large a number of steamers the Hansa Line operated between New York and South Africa during the period it was working outside the conference. That is all in the record in that book. I would have to count them up. I was told to bring the records of sailings. There they are. I have not got them dissected; I have not counted the number of the boats. I will give it exactly when I go over the books and take the names. I have got to go all through them.

Q. We will not do that on the witness stand. I will ask your son. I will put him on.

A. He doesn't know; I will have to figure it out. I was told to bring the record and I brought it.

110 By the COURT:

I can't state how many ships they had prior to the conference. I will say a number. I will make it up for you and send it to you.

By Mr. BAYNE:

The paper handed me, a letter dated October 31, 1901, is signed by my firm.

Mr. BAYNE: I offer in evidence the letter identified by the witness.

Marked Plaintiff's Exhibit CCC.

From October 30, 1901, and on, from that time until June, 1903, the Hansa Line was in the conference. Then the lines in the conference consisted of lines represented by my firm, those represented by Barber & Co. and the Hansa Line; five lines in all. I think that from October 30, 1901, until some time in 1902 there were no regular lines competing with the conference lines. The first line that came then next into the competition was the Prince Line, about August, 1902. I presume that is the date. I don't recall whether it may have been May, 1902, that the Prince Line came into the competition. I think the Houston Line then came into competition with the conference lines. I don't remember how long the competition of the Prince Line and the Houston Line continued. It is my impression that most shippers, the greater number, as to the amount of shipments, were what are called loyal during the period between 1899 and 1903.

Q. Therefore, most shippers in that period paid freight and in the long run would get back a deferred rebate.

A. What I would call deferred rebate is the same thing as originally charged as primage. That is the ten per cent. we have been talking about. Most of them got back the deferred rebate, so
111 that in a great number of instances the conference lines carried the freight for the amount of the net tariff rate.

Q. But in the case of those who patronized competitors they did not get back the deferred rebate, did they?

A. Those that did not conform to the conditions of their contract I don't think got it back. They constituted the smaller number of the shippers. That is my impression.

Cross-examination by Mr. KIRLIN:

I have been identified with the South African trade ever since I went into business, about; I think about 1868 or 1867. During all that time I have been acting either as a broker, agent or as a charterer loading ships from this port to South Africa. During all this time this has always been simply an export trade.

Q. That is, nobody who went into that trade carrying staples from this country to South Africa could expect to get any return cargo?

A. There was no return cargo to come back. Never has been. All vessels went right on beyond there to the Far East and picked up what they could, or else came back to New York in ballast.

Q. As a steamship man and a broker, can you state whether that circumstance is an important one as bearing on the question of the reasonableness of the freight rate charges?

A. Decidedly. If you have return cargoes for the steamers you have another earning. That is, whoever maintains a service to South Africa has to berth there in ballast; no return cargo either to Europe or this country.

Mr. BAYNE: If this line of examination is to be continued, I think it ought to be made clear that the witness is becoming
112 the witness of the defendant in that it is not a cross-examination upon any subject that has been the subject of the principal examination.

Mr. KIRLIN: One of the subjects complained of in the complaint is the excessive rate charged.

The COURT: But the plaintiff has not gone into the reasonableness of the rate.

Mr. KIRLIN: Well, it is immaterial to me whose witness the witness is.

The COURT: Was there any testimony that this conference fixed the rate, or who did establish the rate?

Mr. BAYNE: The conference.

The COURT: Did you draw that out?

Mr. BAYNE: Yes.

Before the Bucknalls, the Curries, the Cayser, Irvine & Co. or the Union Castle Company came into the trade, we dispatched vessels on the berth, sailing vessels on the berth to South Africa, before steamers came into the trade. I berthed the first vessel that went to South Africa from this country. I don't know exactly when it was. I looked up my records and I could not trace it. In my other testimony I think I stated it was about 1872 or 1873, but I think it was about a year later; but that is immaterial. We sent the first vessel in the 70's sometime. I kept up the service myself by chartered vessels, until the steamers went into the trade. It was originally established for sailing vessels. Steamers first came into the trade I think it was in the spring of 1893, about May, 1893. When I first started there were only half a dozen shippers to South Africa. They were mostly just a few shippers that made up cargoes and chartered little vessels of four or five hundred tons, at Port Elizabeth. We acted as brokers. Afterwards I put sailing
113 vessels on the berth, for Delagoa Bay, I think. During the first year I started in the trade, there were three or four small vessels between this country and South Africa.

Q. And up to the time the steamers came in how much had it improved; to what extent had exports gone?

A. I suppose there must have been fifty or sixty sailing vessels a year; perhaps more.

Q. Who put the first steamer in the service?

A. In 1892 I was about going into the market to put the first steamer on myself. I saw the freight would warrant steamer service, and I wrote to some of the steamship people, and I had a cable from them not to do anything in the steamer business until a representative of Donald, Currie & Company came to New York and wanted to talk, and when they came over they said, "We will put on a steamer," and I agreed to it.

Up to this time the increase of business to South Africa was a natural growth. The tonnage was produced as the vessels were offered for transporting stuff to South Africa. Bucknall Brothers came into the service in 1893, and Donald Currie & Co. and the Union Castle Company, and the Castle Mail Steamship Co. In the beginning it was the Castle Company, and it became the Union Castle Mail Steamship Company, Ltd. When the Bucknalls and Donald Currie & Co. came into the service with steamers in 1893, my situation with regard to the service was simply, purely an

agent. I had absolutely no interest at all in the business. I have never had, except as an agent.

Q. Did you ever enter into any agreement with Donald Currie & Co. or Bucknall Brothers, or any of the other steamship owners in relation to the conduct of the steamship service to South Africa?

A. I was simply an agent. I had no interest whatever in the earnings.

114 Q. Did you ever sign any contract or writing with any of these principals in London in regard to the conduct of the service, as a principal?

A. Nothing more than I may have sent them some agreement, acting as agent for the lines.

I am not a ship owner myself. I own no interest in ships. I own no stock in any of these corporations. I am not interested in these copartnerships mentioned in the complaint, except my own.

Q. From 1893 until the time Hansa came into the conference to what extent had the business been developed, the export trade, by the service that was furnished by the A. & A. Line and the Union Castle Mail Company, and the Union Clan Line and the Cayser?

A. It is all in the record. It is merely a question of figures (referring to the record). In 1893 there were eight steamers dispatched by the A. & A. Line and the Union Clan Line. In 1898 there were forty steamers dispatched by the A. & A. and the Union Clan Line. In 1903 there were seventy-seven steamers dispatched.

The development of the trade over that entire period depended upon the state of the market in Africa. There might be depression at times and then booms another year.

Q. You said the members of the conference conferred, as you understood it, with regard to the maintenance of the service and with regard to rates. What was actually done with regard to the development and maintenance of the service? I speak more especially with regard to the regularity of sailings prior to 1898?

A. I don't know how to answer that question other than to say that the tonnage was provided according to the requirements of the trade.

To my best knowledge and belief that was done.

115 Q. And were the sailings comparatively regular or distributed over the different months of the year?

A. Yes, as the needs of the trade demanded.

Rates were not fixed by agents here in New York, to my knowledge; they came to us from the principals in London. We were given cable instructions as to rates to be charged. The rates were printed in the berth.

Q. And was that made public or disclosed to the trade?

A. As I said before when I was asked that question I am not sure; I don't think they were distributed. I think each one of the firms had a book and if a rate was asked that book was referred to and given to the shipper.

On the Produce Exchange it was customary for the merchants and their representatives and the steamship agents or their representatives to congregate daily to discuss the needs of the business,

to ask for and receive rates for transportation, and engagements were made at those daily meetings on 'change.

During the time these circulars were in force which have been put in evidence and marked Exhibits A and B, we had a tariff rate of so much per ton, plus ten per cent. primage. The two things together constituted the primary charge for transportation of merchandise, and subject to complying with the provisions of that circular, any merchant who had paid the tariff, the net tariff and the ten per cent. primage, was entitled to get back a commission of ten per cent. That is what the circular said; it is printed there.

By the COURT: It actually occurred that ten per cent. was paid.

By Mr. KIRLIN: I do not remember when the Thomsen company first entered into the trade. I don't think they were what
116 we would call prominent shippers before the matters involved in this lawsuit came up. They made small shipments. During the period involved in this suit, I could not tell you exactly what their shipments mostly consisted of, what class of merchandise. My impression is it was principally grain or cereals. The bulk of it was cereals.

Q. When these competing vessels came on and you put on what was called the fighting steamers, on which there were cut rates, did not those cut rates relate only to part of the space in the steamer?

A. The fighting steamers?

Q. Yes.

A. I think the fighting steamer was divided up to give each shipper a chance to have a certain portion of the very unprofitable low rates that were operated on such vessels.

Those cut rates were made for grain and other articles, I think. It is my impression that those articles on which the cut rates were made were principally the products that Thomsen & Co. were dealing in.

When applications were made for the payment of these deferred rebates, as I call them, the merchants signed the form on the back of the circulars that have been put in evidence and we forwarded them to London. We, Norton & Son, did not pass on any of those. We might have given London information, if we knew of a shipper that had shipped by an opposition boat, but we did not pass on it. We transferred it on to London, the headquarters of Bucknall Steamship Lines, Limited, Sir Donald Currie, Cayser, Irvine & Co., and after they were incorporated as the Bucknall Steamship lines, and the Union Castle Steamship Company. The Hansa Company was a Bremen company.

117 After a lapse of time those claims for deferred rebates came back to us with instructions to pay or not to pay; or they checked them, sent them to us and told us, instructed us, whether to pay them or not, and if they told us to pay them, no matter what the amount was, we paid them and charged them to them. That is what we had to do. It was also a business in respect to which freights were prepaid either here or in London, and as the result of that, most of the freights passed through our hands, as regards the steamers that we were agents of. There was a practice at the times

mentioned in this complaint of the application for bills of lading by shippers, without the actual payment at the moment, of the freight. They would give the due-bills and pay the freight in so many days, and when all the bills of lading came in, after they received all their bills of lading, they would send a check to cover their goods. That is, when a shipper applied for bills of lading on which the freight was expressed to be prepaid, instead of prepaying the freight, his boy or some representative of the office gave a due-bill, and we gave the bill of lading in place of the due-bill. The due-bill would express the amount of the freight. Those were made payable a certain number of days after delivery, and when the time came, the merchant would pay his due-bill and take it up. I presume Thomsen & Company followed that practice.

Thomsen & Company never made to me any protest or objections, in getting their bills of lading, for the amount which was put on their due-bills, or which was charged on their bills of lading for freight. They did not make any protest that I know of. If they did, I don't know it. To say whether Thomsens put in claims for rebates and were paid rebates under the terms of these circulars, Plaintiff's Exhibits A and B, I would have to refer to my books. I cannot recollect that, except if they conformed to the contract, the records will show whether they received the money. I presume they did.

I spoke of several things that I understood were done by the conference, mentioning specially the names of Hansa Service, and the rates. Those things were done in London. I have no personal knowledge of those matters myself, nothing special, not what they did there, except results after they were done. All I know is, what I got instructions to carry out.

Redirect-examination by Mr. BAYNE:

We had meetings of the agents—not to fix rates, but to discuss the general instructions from London. We would discuss what rates to put, any changes in the tariff, to put before London.

Q. In other words, you were the ones who made the recommendations?

A. No.

Q. Upon which the rates were fixed?

A. No, I cannot say we made recommendations. We put them on London for ratification or approval.

Q. After these meetings of the conference agents in New York to discuss what in your opinion would be the proper rate to fix, is that it?

A. I don't think so.

Q. What did you discuss about the rates?

A. It is so long ago that I forget almost what was discussed—the general workings of the business of the freight as it came along day by day, and the terms and steamers and the engagements on the steamers, and what room was required; what steamers were required of the principals to furnish.

119 Q. Did not you, as a matter of fact, discuss what rates should be charged?

A. I could not recollect.

Q. What is your best recollection?

A. I could not recollect that at all, that we discussed what rates should be charged, any more than what we might recommend.

Q. That is what I mean.

A. We might say to London, you are charging too much for this, and we think it ought to be lower.

Q. Sometimes you could charge more than the rates recommended?

A. I don't think we did that. We put those matters before London to decide.

Q. But you made recommendations, didn't you—you were on the ground here?

A. Sometimes we said we thought such an article, the rate ought to be so and so, or ought to be such a class.

Those meetings were held among the agents of the conference lines, three or four a month, to discuss the matters that related to our working together.

I referred in my cross-examination to the A. & A. Line. I mean by that, the American & African Lines. That was the trade name under which The Bucknall Steamship Lines, Limited, and the Donald Currie & Co. operated. I spoke about sailings. We did not have regular sailing days. We would provide a steamer to fit the requirements of the shippers—the time they wanted their goods to go forward. In this conference among the agents, on this side, what ought to be done to meet the competition of these occasional tramps that tried to get into the business, was naturally among the subjects that was discussed. We posted London as to the situation as it was here, day by day.

Q. And among other things you did with this business in London was to keep watch on the shippers and report those of what you called disloyal?

120 A. We naturally had to report to our principals. They asked if such and such a man had shipped by an opposition, and we had to reply yes, or no.

I don't remember volunteering such information specially. I think Bucknall Brothers were agents of the Bucknall Steamship Lines, Limited, or managers of the Bucknall Steamship Lines, Limited. The letter dated November 6, 1902, purporting to be signed by Norton & Son is not the signature of our firm. It is from our office, but that is from our cashier.

Mr. BAYNE: I ask that it be marked for identification.

Another letter, dated November 7th, 1902, purporting to be signed Norton & Son, and three other letters, dated May 3, 1903, May 6, 1901, and July 2, 1900, were all sent out from our office and signed by our cashier.

Mr. BAYNE: I ask that they be marked for identification.

The letters are marked for identification Exhibit B; Exhibit B-1; Exhibit B-2, and Exhibit B-3.

Of two letters purporting to be signed by Bucknall Brothers, dated November 27th, 1900, and December 29th, 1900, the letter of November 27th is signed by one of the heads of the departments. The letter of the 29th of December, I am not sure of the signature, but I think it was signed by Mr. Moxen. Whether he was a partner or not, I don't know. He had authority to sign this name, however.

Mr. BAYNE: I ask that these letters be marked for identification.

Said letters are marked for identification respectively NN and RR.

121 By Mr. KIRLIN: This 10% primage, which formed a part of the tariff rates after 1898, had always been charged to the South African trade since the line first incorporated. Primage always has been charged. Sailing vessels, it used to be 5%. As soon as steamers commenced, 10%. It is not a new thing. It has always been, from the year one.

By Mr. BAYNE:

Q. But primage as a forfeit of money, to forfeit from a person who undertook to patronize a competitor, was not in existence before these early stages, before the organization of this conference, was it?

A. I did not state that. I merely said the question of primage.

Q. Something which was called primage to be charged?

A. Yes, sir.

Q. But you don't mean to say that that which was called primage, and was surrounded by the circumstances under which that that was called primage was, was gotten from the shipper always, as in this case?

A. I don't understand. All I can say is, that primage is an old custom—5% primage on sailing vessels, and 10% on steamers. That is an old custom.

Q. But I mean to say, was it any old custom to charge as primage that which was held, if the shipper patronized the competitor, but that it was paid back to him if he refrained from patronizing a competitor?

Mr. KIRLIN: I object to that because the circular doesn't justify it. The circular does not say 10% primage will be charged, but says, if the competitor is not patronized a commission of 10% will be restored. There is no more resemblance between the 10%

122 primage and 10% deferred commission than there is between 10% net rate and the 10%. My friend suggested that 10% was taken to be forfeited—that is, this particular 10% was taken.

Mr. BAYNE: The Circuit Court of Appeals has suggested it.

Mr. KIRLIN: They said that was what you alleged in your complaint.

The COURT: I think I will permit counsel to ask what the witness meant by primage. I suppose that is the purport of the question.

Mr. BAYNE: The purport of it is to show that they used an expression in describing a thing which is entirely different from what was formerly used and described.

The COURT: Is the word "primage" used in any of these documents?

Mr. BAYNE: Yes, in the bills of lading.

Mr. KIRLIN: Yes, in the bills of lading, but not in this.

The COURT: Find out what he understood by primage and what elements entered into it.

Objection overruled.

A. I could not answer that question. I don't know how long that custom has been in vogue. I could not say.

Q. Can you answer that particular question, Mr. Norton, as to whether it was a part of this old custom you mentioned?

A. No, it was not a part of the old custom.

Mr. KIRLIN: Not a part of a new custom there, was it?

123 HERBERT BARBER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. BAYNE:

I am one of the defendants in this action. I was a member of the firm of Barber & Company, composed of myself and James Barber. We were incorporated in 1902, I think. In June, 1899, my brother and I were members of that firm and in January, 1899. That firm of ours was in existence from 1893 on. From January, 1899, our firm was the New York agents of the Union Clan Line. The Union Clan Line was a trade name.

Q. And was the Union Clan Line the trade name under which Cayser, Irvine & Co., and the Union Castle Steamship Company, did business?

A. Not all the time.

Q. I show you Plaintiff's Exhibit B, in which I refer you to Union-Castle Mail Steamship Company, Ltd., Cayser, Irvine & Co., hitherto working as Union-Clan Line, and ask you if that is true, that they were hitherto working as Union-Clan Line?

A. They were, in 1901.

But not from the first date you mentioned, 1899. Prior to that they had another organization.

Q. I show you paragraph second of your answer and ask you to read it. Don't read it aloud—read it to yourself.

Q. I ask you if you verified that answer?

A. I did, yes.

Q. Is the fact stated by you in the second paragraph of your answer true?

A. But he also states other things besides, in that second paragraph—that the Union-Castle Mail Steamship Company, Limited, at the time mentioned in the complaint was and still is a
124 foreign corporation. That is all right.

But they did not own the Union-Clan Line all the time from the time you mention. At the times mentioned in the com-

plaint James Barber and I were co-partners, doing business under the firm name of Barber & Company. During the period in question, that is from January 1, 1899, to June, 1903, the members of the firm of Cayser, Irvine & Company were the persons named in the complaint to the best of my knowledge and belief. During that period we acted as their agents in their business of transporting freight to South Africa, and during that period we acted as the agents of the Union-Clan Line, that business name, in the same business. That is, Cayser, Irvine & Company were a part of what is designated as the Union-Clan Line.

Q. And after November 1, 1901, instead of using the name Union-Clan Line, the steamers were operated under the name of the real owners, the Union-Castle Mail Steamship Company, Limited, and Cayser, Irvine & Company, were not they?

A. The lines were operated the same as ever, as the Union-Clan Line.

Q. I say, they were operated after that time, under the names of the Union Castle Mail Steamship Company, Ltd., and Cayser, Irvine & Company?

A. After that they were the owners after that date.

Q. November 1, 1901?

A. November 1, 1901.

I knew the firm of Norton & Son, between December, 1893, and June, 1903. They were engaged in similar business to what we were engaged in. They were steamship agents. The lines represented by us and the lines represented by them first worked in conference in 1893, and they continued to work in conference, the lines we
125 represented and the lines they represented, engaged in the South African trad-, from that time on until June, 1903, the date of this suit.

Up until June 15th—about June, 1901, there were four lines in the conference, and after June there were four or more lines in the conference up not only until June, 1901, but up until about June, 1902. The Hansa Line did not come into the conference until October, 1901. Up to that time the lines that were in it were only four in number. From that time on the lines that were in the conference were five in number, that is, they included the Hansa Line. The lines represented by Norton & Company were operated under the trade name of the American and African Steamship Line. The lines which were represented by us and the lines represented by Norton & Son, engaged in the carrying of freight between New York and South Africa did not compete between April, 1899, and June, 1903. We worked in conference. We shipped at uniform freight rates as near as we could. We might be badly up for freight, and make little concessions to fill up the ship—something of that sort, but that was done by agreement between the conference lines. We did not compete with one another in our freight rates.

Q. And did you compete together in opposition to any lines that came in from the outside and tried to get any business?

A. When any outside boat started to load we tried to get freight away from it.

We united together in doing that. We decided on the method to be employed together as well as we could.

But up until the Hansa Line came in to compete, in June, 1901, there practically were no lines engaged steadily in the South
126 African trade, except the conference lines, and except the sailing ships. There were no other steamers—well, once or twice a steamer came on the road.

Q. And when once or twice a steamer came on the road, did you get together to see what could be done to it?

A. No; they got their full cargo and got away.

They took the cargo they were fixed to load. They got away before we knew anything about it, probably. When we knew there was any outside steamer getting a cargo, we would try to get the freight from it, certainly.

Q. And you united together on ways and means of dealing with it, didn't you?

A. We would probably consult together, yes, if that is what you mean.

Q. And did you in taking goods for a shipper follow the same method that Mr. Norton has testified about? Did you hear Mr. Norton's testimony?

A. Not everything. I could not hear plain all he said.

Q. That is to say, when a shipper wanted to ship goods you would charge him the net tariff rate and in addition to that 10%, wouldn't you?

A. All our rates carried 10% primage.

Q. In other words, in addition to your rate, you would add 10% as what you call primage?

A. Primage, yes.

Q. And did you have charge of the return to the shippers of this 10% when the shippers had been what was called loyal?

A. Which 10%?

Q. The 10% that had been charged in addition to the net tariff rate?

A. We had charge of returning the 10% commission, as termed in those circulars.

Our firm had charge of paying back to the shippers that 10% commission, we called it, for our lines. Our cashier department returned it. And in the majority of instances of freight that
127 was shipped during the period you have referred to, the shippers remained what I call loyal.

Q. And therefore in most cases the shippers had their goods shipped and carried at a price between,—paid amounting to the net tariff rate, equal to the net tariff rate?

A. Except those whose consignees shipped by other ships—they did not get the 10%.

Q. Did they in addition to not paying 10% to the shippers, when he himself had patronized a competitor, did they keep his 10% also if his consignee had patronized the competitor?

A. We would keep the 10% on that particular shipment.

If the shipper patronized a competitor, they kept all of his 10%

then on hand, whatever the circular stated, whether it was 9 or six months—whatever it was. In most instances the shippers remained loyal, so in most instances the rate at which shippers got their goods carried was an amount equal to the net tariff rate. That is what it resulted in.

Q. But in the case of those shippers who patronized competitors, the amount that they ultimately paid would be 10% more than the amount which the loyal shippers paid, in the aggregate?

A. They would pay the regular freight, the tariff rate, with 10% primage, and they would not get the 10% commission back. They would pay the 10% primage for years.

If one shipper shipped precisely the same goods as another shipper, on the same ship and under the same circumstances, and one of them afterwards patronized the competitor and the other did not, the one who patronized the competitor would have had to pay 10% more for the same shipment than the one who did not patronize the competitor. It would result in that. I am not able to state the amount of so-called primage paid to us as agents of the lines
128 we represented by the plaintiffs, between April 15th, 1901, and June, 1903. I have not any books of our company here from which I can make a statement of what that amount was. I was served a subpoena to provide sailing lists from the year 1817 to 1903. That was rather too much of a job for me. I could not find it.

Q. I am asking you now whether you were not served with a subpoena to produce your books of account in order to show how much was paid by these plaintiffs to you as agents of the lines you represented between the periods you have mentioned, as so-called primage?

A. No, sir, that is what I was asked to produce (showing paper).

We kept books of account showing how much money we received from shippers. I don't think we have any such books of account now. I may look for them if you want them.

Q. I would be very much obliged if you would look, my purpose being to show how much you received from these plaintiffs, between April 15, 1899, and June 15, 1903?

A. I will see. If I have got them I will let you have them. Looking at Plaintiff's Exhibit A, where they speak of what amount will be given back if the shipper does not patronize a competitor, the amount given back was 10%, calculated upon the net amount of the freight at tariff rates.

Q. So that if a shipper paid \$50 as the net rate at tariff rates, he also had to pay, in addition to that, \$5 as so-called primage?

A. It might have been more than that.

Q. Was not that the amount you charged as so-called primage during this entire period of shipments to South Africa?

A. No, sir, shipments where the freight was payable in the colony, paid 15% primage.

129 Q. What colonies do you refer to?

A. In South Africa.

Q. Where the shipments, to Cape Colony, Natal and Delagoa Bay, were they different?

A. Ten per cent. for freight prepaid here, and 15% if the freight was payable abroad.

Q. I am asking about freight in which it was paid here, was not it uniform to those ports I have mentioned, the charge was called primage 10%?

A. If they prepaid freight from New York, yes. That is the method on which we conducted the business. That is the method on which we conducted the business with the plaintiff. I believe he paid his freight in general. So that would be 10% additional to the net amount of the tariff rates if paid in New York.

Q. So that if a man paid \$50 as the net tariff rates for the shipment, and prepaid his freight in New York and shipped it to the ports that I have mentioned, you would have him pay in addition to the \$50, \$5?

A. He would pay \$55.

Q. I ask you to state what you understand to be meant by 10%, calculated upon the amount of the freight at tariff rates, if \$50 was a tariff freight rate?

A. The net freight was the rate less the primage. The amount which he would receive back would be 10% upon the net tariff rate. So if the net tariff rate were \$50, he would have to pay \$55, and if he were loyal he would get back \$5.

Q. I show you four letters consisting of seven sheets, and ask you if the signatures—being dated October 30, 1901, June 11th, 1900, November 23rd, 1901, and October 31, 1901—and ask if these were letters sent out by your partnership?

A. Two of them were and two of them were not.

Q. What were the two, dated June 1, 1900, and October 130 30, 1901, sent out by your firm?

A. They were, yes.

Mr. BAYNE: I ask that they be marked for identification Exhibit 2 and Exhibit FF. They have the marks on them already.

Witness continues:

I recognize the signatures on the letters dated October 31, 1900, and November 23, 1900. They are Mr. Campbell Cook, London, freight traffic manager of the Union Castle Main Steamship Company, Limited.

Q. Did you say he was the manager of the Union Clan Line?

A. No, the Union Castle Mail Steamship.

Q. I observe the letter dated October 31, 1900, is on the letter paper headed Union Clan Line. What was his connection with the Union Clan Line?

A. The Union Castle Mail Steamship Company was at that time joint owners with Messrs. Cayser Irvine & Company of the Union Clan Line.

Mr. BAYNE: I offer in evidence the letters identified last by the witness as Exhibit 1, dated the 31st of October, 1900, as Exhibit O, and the one dated November 23rd, 1900, as Exhibit N.

Received in evidence as Exhibit O and Exhibit N.

Mr. BAYNE: With the exception of the payments made to you by the plaintiffs between the dates I have mentioned, I close your examination.

Cross-examined by Mr. KIRLIN:

Our business was incorporated, I think in February, 1902. The Union Castle Mail Steamship Company was incorporated in the early part of 1900. The Union Castle Mail Steamship Company, Limited, came into this South African business in the early
131 part of 1900. Prior to that date, the business had been conducted by the Union Mail Steamship Company and the Castle Line, which was conducted by the Union Castle Mail Steamship Company, Limited, after that date. The Castle Line—was the Castle Mail Packet Company. Those two companies were amalgamated.

During the time that we were agents for these various lines, not all the lines were operating all the time. Some of them were operating during some part of the time, some during some other part. The method of operation of the service was determined in London. My relations to the matter as a member of the firm of Barber & Company was we were agents. I had not at this time any interest in any of these lines. That is from 1899 to 1903. We had no interest except as agencies. We had not at this time entered into any contract or agreement with them for the operation service, nor had we any interest in it except as an agent. That is, not at the time you are speaking of. I did not ever during this time sign any agreement or contract of any kind for the formation of a service to South Africa during the period mentioned in this complaint. I had no interest in it except as agent. We were paid a commission on the freight booked. On the service. The practice of charging primage has been in existence according to my experience, in the South African steamship trade since 1893. It is not limited to that trade. It is a universal charge most all over the world.

Q. Is a part, an integral part of the freight rate charged for a shipment?

A. It is.

Where primage is charged, freight is also charged customarily in the same document, the bill of lading. That is, on the face of the bill of lading there is a statement of a certain amount of
132 freight and a certain amount of primage. That is almost universal practice of most every trade. It is not the same thing in all trades. It is not always the same in this trade.

Q. Now, what had you to do with the paying of this deferred commission of 10% under the terms of these circulars, that is, what had Barber & Company to do?

A. When we get a list from London, as to the people to whom we are to pay the money, we pay the amount set against their names. Barber & Company did not exercise any judgment or discretion as

to whom should be paid the return commission under these circulars and who not.

The applications for the rebates were handed to Barber & Company by the shippers on Barber & Company's ships. We sent them on to London. We paid out those we were told to pay out, and only that. I am a steamship owner also; I have owned steamships or been interested as a steamship owner ten years. We own several vessels. I am acquainted with the costs of operating steamship in such service as this service to South Africa. This service from New York to South Africa—is an export trade; only export trade. No import trade. That kind of trade cannot be maintained at relatively equivalent rates as a trade in which there is a return cargo because the steamer has to make a long voyage in ballast from the final port of discharge. The distance from the port of New York to the customary ports of discharge in this service—to South Africa, is something like seven thousand miles. The voyage of such ships as we usually employ would take about thirty-five days. The facilities at these ports of discharge for delivering cargoes during the time in question were very bad, in 1893 to 1903; very slow, great delays.

There were delays in connection with delivery. Vessels that
133 were dispatched in that trade to get return cargoes would go to India or Java. Those ballast voyages from South Africa are practically to ports of return loading. It is about four thousand miles to India from South Africa.

Q. Were the vessels that were dispatched on this service from here to South Africa brought back here under this conference arrangement, or did they go off conference when they delivered their cargoes in South Africa?

A. That would depend on the trade. Perhaps one-third came back direct in ballast and the other two-thirds went on and picked up cargoes in the East. The other two-thirds did not come back here. Those that came back came back empty. I have not with me a schedule of the rates that were in force during the time complained of here, from 1893 until—or, rather, from 1899 until 1903, but I believe the book Mr. Norton produced covers it. I could not find ours. I think ours has been destroyed.

Adjourned to Tuesday, April 20th, 1909, at 11 a. m.

NEW YORK, April 20, 1909.

HERBERT BARBER resumed the stand:

Cross-examination continued by Mr. KIRLIN:

I could not find the schedule of rates prevailing at that time on our files. Mr. Norton produced one yesterday.

Q. What were the conditions prevailing especially during 1899 and up to 1903, which affected the freight rates?

A. Steamships were very dear. Freight business was good
134 all over the world, and the South African ports were congested with the dispatch of steamers there for the Boer War, and the delays of the steamers were very great and therefore steamers had to

have high rates of freight to make up for the detention and expenses that occurred in South Africa.

The ordinary period of detention of a vessel discharging at say two or three ports in South Africa, under normal conditions, was from twenty to thirty days.

During this period we had steamers there that were detained as long as 120 days discharging. Some of our competitors had steamers there 150 days discharging. Although mail boats got preference, some of the mail boats were three months on the coast before they left. That had an effect on the rates which had to be charged in order to realize a fair profit. This was at Cape Town, East London and Natal. They were the usual ports of call for these steamers. The business was conducted during this period partly with boats that were owned by members of the conference, partly by boats chartered by them for the service. The market for boats that were chartered was affected by these considerations most decidedly.

Q. In such times and in case of such delays as were inevitable to be encountered in South Africa, could boats be chartered for that business at such reasonable rates as they could under normal conditions?

Mr. BAYNE: That is objected to.

Objection sustained. Exception by plaintiff.

The COURT: It seems to me this man is here to testify in relation to the transportation of merchandise to South Africa and why would not his testimony be helpful in this suit?

135 Mr. BAYNE: What I object to is this witness stating to the jury what is reasonable. It is for the jury to decide that. He may state facts from which they may draw that inference and perhaps if he is an expert he may express an opinion on those facts.

Mr. KIRLIN: I will eliminate the word "reasonable" in the question if it would make any difference.

The COURT: You may draw out the situation that existed at that time, how he viewed it, whether they were unreasonable in view of the circumstances.

Mr. KIRLIN: What I am addressing myself to is this: The witness says the business was transacted by the principals, not with their own boats, but with boats which they had chartered in the open market to make these voyages. Of course the price that the principals have to pay for the boats that do the business has a relation to the reasonableness of the freight rates that they charged the shippers who made the shipments on such chartered vessels.

Mr. BAYNE: We concede that.

Mr. KIRLIN: Therefore, I am asking him whether, in view of the conditions that actually existed in South Africa at this time, it was possible for the owner to charter vessels to conduct the business at such a rate as they could have been chartered under normal conditions. It seems to me that is a fair question for his expert testimony. It bears on the reasonableness of the rate which the principals in their turn charged Thomsen.

Mr. BAYNE: We concede that it is proper for him to prove that it cost more at this time to charter a vessel than it cost at other times.

Q. What would your answer be, then?

A. You could not charter vessels at normal rates at these
136 times. The period from 1899 to 1903 is the time I refer to.

Q. Now, taking into consideration all those factors and conditions which you say went into the freight rates that were charged to the shippers here, including Thomsen, will you state your opinion as to whether those rates charged at this time were reasonable or unreasonable?

Mr. BAYNE: May I be permitted to ask two questions of this witness on the subject of his competency?

The COURT: Yes.

By Mr. BAYNE:

Q. Do you know what profits were being made by the defendants during the period between January, 1899, and June, 1903?

A. In a general way I do, yes.

Q. Do you know the profits that were being made from time to time?

A. I could tell you a great many losses during that time.

Q. Do you know what the profits were?

A. No, not exactly, but we had complaints from our principals of the losses they were making.

Q. Your information on that subject is derived, then, from the fact that you had complaints from them.

A. Yes.

Q. But not from any knowledge of what they were making from net profits?

A. I noticed how steamers would go out, and I know what profits they would make on that voyage, and from my knowledge in that way I know they were not making any profit, any unusual profit at all events.

Q. Do you know the exact amount of profit they did make?

A. I do not, no; but I know of individual cases where they made clear losses on charters—heavy losses on charters. I could see that easily without being told.

137 By Mr. KIRLIN:

Q. The question is whether these rates that were being charged during this period were, in the light of existing conditions, reasonable or unreasonable?

A. They were reasonable.

Mr. KIRLIN: Mr. Barber has testified that primage exists in all trades and has existed always.

Q. Is that right?

A. Not all trades. In a great many trades it exists all over the world.

Q. State what the custom is about charging primage and how primage is viewed by the trade, that is, by shippers and carriers, whether as part of the freight or not part of the freight charged.

By the COURT: There is a custom among shippers in relation to primage. It is looked upon as part of the ship's earnings. It has

been the custom ever since I have been in business, some forty years. It prevailed before we had any rebate system. In 1893 we charged ten per cent. primage to shippers and they paid it without question and did not get a cent of it back. That custom prevailed in this port of New York with reference to shipments to South Africa.

By Mr. KIRLIN: In stating my opinion that these rates were reasonable, I included the ten per cent. primage as part of the rate in forming my judgment. That is as much a part of the ship's earnings, ordinarily, as the freight rate stated in the body of the bill of lading as the principal rate. I mean apart from this question of the return of the ten per cent. These rates that were offered under these circulars that were put in evidence were open rates. These rebates were open rebates. Open to all shippers.

Q. Prior to the introduction of this ten per cent. rebate
138 return, in this trade, had there been a similar system in vogue in England?

A. There had. I can state of my own knowledge that the system originally introduced here was similar to that which had previously prevailed in England.

Q. Please explain to the jury the economical reasons for the introduction of ten per cent. rebate, that is, the original charge in the freight rate and the ten per cent. return to shippers who shipped exclusively by the carrier's liens.

A. The trade from the United Kingdom to South Africa, the same as from New York to South Africa, is one-sided; there is only outward freight. There is no return freight to help steamers out, and unless a certainty of outward freight can be obtained, they cannot keep regular service. A man who ships and does not pay the ten per cent. reserves to himself the right to ship by any outside opportunity that offers, and it is profitable to the steamship company to pay the ten per cent. back to the majority of shippers to get an assurance of their support at all times. They will not take their freight from the steamers on their lines when some outside steamer turns up to compete with them.

Mr. BAYNE: I assume that he has made the witness his own. You make him your own?

Mr. KIRLIN: Yes.

Q. This system, therefore, had been in effect in this port, in this trade, the deferred rebate system, for how many years before complaints began to be made by Thomsen?

A. I don't know that date. It was 1898. You had the circular read yesterday. I think it was 1898.

From 1898 to 1899. A list was made at the last trial and handed in of the total number of sailings made by the conference steamers
and the sailings by opposition vessels during the period we
139 are inquiring about. You have a copy of it. That is the list. The first five on the list are conference steamers that were dispatched, and the sixth page is a list of the opposition steamers that were dispatched. During that time, in addition to the opposition steamers there were opposition sailing vessels. This does not show the sailing vessels. Sailing ships are not mentioned here,

only steamers, but it gives the dates the conference steamers were dispatched and the date the opposition steamers were dispatched. There is a summary at the foot showing the number of sailing vessels in the different years, but not the names of them.

Q. I will read this list, for convenience.

The list is marked Exhibit 1.

Q. Were all these steamers in the alleged combination?

A. Yes. These were all conference steamers.

Mr. KIRLIN: This gives conveniently the tabulation:

Summary.

American Sailings.

	Conference steamers.	Opposition steamers.	Sailing vessels.
1893.....	9	.....	1
1894.....	12	.....	17
1895.....	17	.....	22
1896.....	37	.....	39
1897.....	31	.....	42
1898.....	40	8 Arkell Douglas	6
1899.....	41	.....	1
1900.....	34	.....	5
1901.....	29	4 Hansa	6
1902.....	45	12 Prince Houston	9
1903.....	55	22 do	
1904.....	32	16 Prince	
1905.....	28	5 do	

140 By the COURT: These opposition steamers and sailing vessels sailed from New York.

By Mr. KIRLIN: To the same ports in South Africa that the conference vessels were going. The conference steamers or the conference sailing vessels gave regular sailings to the trade. The opposition steamers did not. The conference steamers gave fairly regular sailings. We began by one a month and then we got to one every three weeks and then we got two a month. At last we got four steamers a month.

Q. Having regard to the conditions of this trade as you have described them, was it commercially practicable for any one member of this conference or any other individual ship owner, to supply the needs of this South African trade by sailing vessels?

Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception by defendant.

Redirect examination by Mr. BAYNE:

I estimate in giving my opinion as to what is a reasonable rate that eleven per cent profit per annum on the capital invested would

cover depreciation, I suppose. I do not mean eleven per cent net profit. I mean the depreciation would be five per cent and the ship owner ought to get at least six per cent besides the depreciation.

Q. I ask you to look at this paper and state whether it does not correctly show the freight rates charged by the conference lines during the years 1899, 1900, 1901, 1902 and 1903, based on 141 the grain rate to East London (showing witness a paper)?

A. I cannot answer that question. I have not got the data to check up. This book is only for 1902.

Q. In October, 1889, were not the net tariff rates charged on grain from New York to East London 35 shillings per ton?

A. I could not say for certain. About that rate. I would suggest, if you would let me have a copy of that I will get our rate clerk to check it up.

Q. You cannot tell it from what you have?

A. No; this book only gives the 1902 rate. I can only give you a general idea of what was the amount that had to be paid to charter a vessel to be used from New York to South Africa in October, 1899, without actually referring to the actual market. I cannot carry in my head the ten years' freight rate. It is not a stable market up and down. During 1899 the rate might vary five shillings per ton.

Q. I am asking about the month of October, 1899, and the seven previous months.

A. I could not tell you without referring, to find out what those rates were.

Q. I am asking you now not what the tariff rates were, but what the cost of chartering a vessel was; you cannot answer that?

A. Only in a general way. I would say it was somewhere between 30 and 40 shillings per ton. In the month of November, 1899, the rate for chartering vessels would be going higher because we were then just at the beginning of the Boer War when steamers were dearer. The Boer War ended in 1901 or 1902, but the congested condition lasted very long after the war ceased. The chartering of vessels was by the ton. The cost of chartering a vessel was from 30 to 40 shillings per ton, on a dead weight capacity.

Q. When you say per ton of the dead weight of the vessel does that mean that if you paid for a vessel of 10,000 tons you 142 could carry in that vessel 10,000 tons of goods?

A. It depends what the goods were. If the goods were feathers they could not; if they were lead they could. Suppose the goods were grain, you could carry in a 10,000 ton vessel about 7,800 tons; no, about 8,200 tons. I don't think I did testify that tramp steamers had an advantage over the conference steamers.

Q. Well, did the tramp steamers have any advantages in the cheapness of their doing business over the conference steamers?

A. You may call it an advantage. They are not as well equipped steamers as we load, and they can go in and out as they please. I don't think they could do the business at a lower rate profitably. The advantage they had was that they would come when they pleased

and go away when they pleased. That did constitute a financial advantage. They would go on their next voyage to India.

Q. And did that enable them to carry freight at a lower rate than those steamers that did not come in in that way?

A. They would be able to handle transient business better that way, and they did occasionally offer to carry at lower rates than were charged by the conference vessels. Not generally, occasionally. You could not always get a tramp steamer. I did testify at the last trial that one of the objects of the conference was to keep out tramp steamers. That was not because they carried goods for lower rates than we did, but because they broke the continuity of the rates and upset the shippers and upset the trade generally.

The COURT: What do you mean by one of the objects was to keep out the tramp steamers?

A. Keep them from coming on in opposition to our steamers running to South Africa—the conference steamers.

143 By Mr. BAYNE: To keep them from having any part of that trade which we wanted for ourselves, that's it. Referring to the defendant's Exhibit 1, in the year 1899 the conference steamers were forty-one in number, and the opposition steamers were none at all—I believe that's so. And in the year 1900 the conference steamers numbered thirty-four and the opposition steamers numbered none at all. So that unless a shipper to South Africa during that period shipped by sailing vessels, it was necessary, in order for him to do business, to ship by the conference steamers, or charter a steamer for himself; the whole cargo himself. If he had to ship anything else than an entire cargo, he would have to patronize the conference steamers. The sizes of the vessels that we loaded were from five thousand to ten thousand tons weight.

Q. Now, the sailing vessels in 1899, I notice there was one single sailing vessel that ran. Was that not a vessel of small tonnage?

A. A sailing vessel that went down to South Africa required from one thousand to two thousand tons. I think there were not some of them five hundred tons at that time. We cut out that. They were not generally chartered by some shipper who had a thousand tons to ship. He generally had about a half a cargo, or two-thirds of a cargo to ship, and then he would go and get some of his friends to make up a cargo. I suppose he would do that in preference to shipping by the conference lines.

Q. And he would do it very much cheaper, if he did it that way, than by patronizing the conference lines?

A. And worse, perhaps.

Q. Would not he do it cheaper?

A. A slower method, and the cargo might come back on your hands. There is competition between sailing vessels and
144 steamers—a lot of rough cargo that can go other ways.

Q. But general merchandise, sailing vessels cannot compete with steamers from here to South Africa, can they?

A. Well, I think they can.

In the year 1900 there were only five sailing vessels. They were the same as described before. In other words, they were semi-

private enterprises. So that in the year 1899, and 1900 the conference vessels were practically the only vessels open to the general trade.

In the year 1901, during which the conference vessels had 29 ships and the Hansa Line had four ships and the opposition steamers had four ships, those four ships were ships of the Hansa Line, and they ran during the period of about four months only. Then they, like all these outside boats, they all carried the conference.

Q. And during that period they offered to carry freight at lower rates than offered by the conference?

A. At ridiculously low rates.

Q. Rates though that were not ridiculously low from the point of view of the shipper?

A. Oh, yes, they knew they were low, too. In 1902, when there were 45 conference vessels and 12 opposition vessels, those were vessels of the Prince and Houston Lines.

Q. And in 1903, when there were 55 conference vessels and 22 opposition vessels, they were vessels of the Prince and Houston Lines also, were not they?

A. I am not sure about the Prince being there—when it came in the conference. I think Houston came in and Prince after. They all wanted to get into the company on their own account though—all wanted to get into the conference. They could not make trade outside. I testified in regard to this subject of 145 primage charge, as to its being a custom and having been a custom in the South African trade. After this suit was brought they dropped charging primage.

Q. And while the Hansa was engaged in competing with you, it did not charge any primage either, did it?

A. They did as they pleased. I could not say that they pleased not to charge any primage. I am not sure.

Q. And isn't it a fact that the Prince and Houston Lines while they were engaged in competing with you, that they did not add on any primage?

A. I don't know.

By the COURT:

Q. What did you say about the Houston Line primage?

A. They charged what they pleased. I don't know whether they charged primage or not. They could take what they liked. I don't know whether they charged primage or not.

By Mr. BAYNE: It was after 1903 that the conference lines stopped charging primage. I don't know exactly how long after. I could not tell you for certain that they did stop that in June, 1903.

Q. Well, isn't it a fact that in the month of June, 1903, they charged on grain to East London 23 shillings 9 pence, and also charged a primage, and that thereafter, for the next six months they stopped charging the primage and only charged the 23 shillings 9 pence?

A. I could not tell you. I don't remember that.

I don't remember that really to be the fact.

Relative to the agency, I testified that we did the work on a commission basis; and our commissions were computed on the freight collected. The more freight there was collected the more
146 commissions we got. In carrying out this agency, I knew what the arrangement was among the conference lines. I knew that they agreed not to compete with one another. When the circular came out, we knew about this primage, too.

Q. And you collected the moneys for the freights and returned the rebates when the time came?

A. When we got in touch with London to do it. We had meetings with Norton & Son, representing the other two lines, and later with Hansa, when it joined the conference, relative to matters pertaining to carrying on the business together. At those meetings we discussed questions of rates, and we made recommendations to London relative to that subject.

Q. And did you also in the course of your agency keep a watch on the shippers, to determine whether they had done anything that warranted a forfeiture of their rebates?

A. Oh, we would keep a general run of what was going on in the trade, certainly.

Q. And you would report them if they patronized a competitor, as a part of your agency?

A. I don't know that we would. We would probably talk with them about it first.

The COURT: See if I understand. Was it the agreement that the primage should be repaid only in case the shipments were with any one of the lines or a particular line?

Mr. BAYNE: Any one of them; any one of the conference lines. There was no penalty imposed so long as they patronized a conference line—any of the conference lines, all of which charged the same rates.

Q. These commissions which you paid for your agency
147 in transacting this business, were they pooled between you and Norton; divided on a fixed basis?

Mr. KIRLIN: We object to that. There is no allegation in the complaint about this. That is entirely their own private business.

Mr. BAYNE: This is a defendant in this action. It is a conspiracy that I have charged, and I am attempting to show co-operation.

Objection overruled. Exception by defendant.

Q. Were they pooled between you?

A. They are pooled at the present time, but they were not pooled all the time during your period of action. They were pooled a portion of the time.

Q. A large part of the time?

A. I really could not tell exactly. It was somewhere in the end of the nineties that we arranged to pool our commissions.

Probably 1900 or 1901. Thenceforth and including 1903 we did pool our commissions with Norton & Son on an equal basis. That is, we divided equally between us, so that even though the

freights which were paid to the lines of which I was agent were small, nevertheless I would share in the commission which Norton & Son made upon freights paid to the lines represented by them.

By Mr. KIRLIN:

Q. The reason for that I suppose was because you engaged freight for the other ships as well as the ships you were agents for?

A. We made contracts to cover our lines all the time.

By Mr. BAYNE: We were working for them as well as for ourselves, and our interests were identical.

148 By Mr. KIRLIN:

Q. During all the time of your connection with this company and with this conference, did you act here in New York otherwise than as an agent?

A. During the time in question?

Q. Yes.

A. I acted simply as agent. In doing the things that we did, we had instructions from our London office. We acted only under instructions. When I say for the London office, I mean for the principal in London.

Q. Now, some reference has been made to the fact that you did not charge ten per cent primage after 1903. What was the condition of the freight market at that time as compared with 1900 and 1901?

A. Freights became lower, and they have been going lower ever since.

Q. How did they compare with the present time, for information, with what they were in 1900 and 1901?

A. The present rates are about 20 shillings, where before they were 27 shillings and six pence to 30 shillings. The freight rates which were charged in the South African trade during the years 1899 and 1901 were about equivalent; on a par with the other long voyage rates.

By Mr. BAYNE: The package of letters handed me are all our letters.

Mr. BAYNE: I ask that the letters in question be marked for identification.

Said letters are marked for Identification as follows: Exhibit R, consisting of one letter; S, consisting of one letter; T, consisting of one letter; U, consisting of one letter; V, consisting of one letter; W, consisting of one letter; X, consisting of one

149 letter; Y, consisting of one letter; Z, consisting of one letter; AA, consisting of one letter; BB, consisting of one letter;

CC, consisting of one letter; DD, consisting of one letter; EE, consisting of one letter; HH, consisting of one letter; II, consisting of four letters; JJ, consisting of two letters; MM, consisting of two letters.

Q. You have been asked as to the reason for dropping the primage charge after the month of June, 1903, and I understood your answer

was something to the effect that rates had gone lower then. When rates went lower on previous occasions you did not drop the primage charge though, did you?

A. No. There was not another reason why we dropped the primage charge that I know of. I don't know any other reason. I had not had any conference with the United States District Attorney. I had not heard of any conferences with the United States District Attorney relative to this primage charge. I heard that he had a conference with some lines, Brazil lines, with reference to a rebate charge. It isn't a fact that the reason for dropping this primage charge was not that the rates had gone lower solely, but because we were advised that the proceeding theretofore had constituted a violation of the Sherman law.

ADAM SULIMA, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. BAYNE:

I was connected with the plaintiff's firm during the years 1899 to 1903. I had been connected with that firm since the middle of 1898, and have been with that firm ever since. I had full charge of the Eastern Department of the firm's business during the 150 years 1899 and 1903 inclusive. That included at that time, the commencement, 100 per cent of the Eastern Department consisted of the South African business. I had entire charge for the plaintiff of his South African business.

Prior to the establishment of that business I did go to South Africa. I started from New York in September, 1898, and after staying for about a month in London, England, calling upon all the houses, who had branches in South Africa, and the banks, and financial arrangements, I proceeded to Cape Town. I stayed in Cape Town three or four weeks, and went from there to Port Elizabeth, and there met all the bankers and merchants, and satisfied myself of the entire South African business situation. I fully advised myself of the South African trade. I kept in constant touch with it, by continuous correspondence. I knew what the supply and demand were of that trade, and have met all our buyers personally. They explained to me the requirements. And it was a part of my duty to see that I offered them things that they bought. When I say buyers, I mean persons who bought goods from us.

Q. Referring to the transactions of which the shipment of goods constituted a part, where a 10 per cent is claimed in this case, were those sales made to persons in South Africa of goods by you?

A. They are not included.

Q. Were they sales by you?

A. They were sales. And our agreement was to deliver in South Africa the goods at a given price. We had to deliver and give net prices. So that in each instance, we had to pay for the goods ourselves and we had to pay for the freight for carrying it to South Africa and for the insurance of it on the way, because our con-

151 tract was to deliver to the buyer at South Africa. In addition to the business of selling outright to buyers in South Africa, we did a small commission business, so-called indent business.

Q. Were any of the transactions involved in this suit of that character?

A. They are not included. The suit only relates to transactions where we sold outright to the buyer in South Africa.

Q. When was it that your firm began to ship goods to South Africa under these contracts of sale?

A. We started our shipments to South Africa, in April, 1899.

Q. At that time were there any other means of shipping to South Africa from New York except by the lines of the conference?

A. No.

At that time there were only two lines. At least, there were several London lines represented by two New York houses, called the Syndicate Lines or Conference Lines, we should call them, and they were represented by Messrs. Barber & Company and Norton & Son. As far as I recollect, Donald, Currie & Company were one of the lines represented by Norton & Son. The trade name of Norton & Son was the American and African Steamship Company, and there were two or three component English firms back of it. The Bucknall Brothers, besides Donald, Currie & Company were included in the American-African Steamship Company. In the lines represented by Barber & Company, they were two in number—there was Cayser, Irvine & Company and The Union Clan Line.

Q. I am speaking of the period now of 1899. Was the Union Castle Steamship Company, Limited, one of the lines they represented?

A. Yes. The Union Castle Steamship Company, Limited, was also included.

Q. At that time?

A. Yes.

152 Our firm during the period from March, 1899, until August 12th, 1902, did not ship by any lines except the lines represented by Norton & Son and Barber & Company, that is to say by the Conference Lines, we did not with two exceptions. Those were cases where they gave us immunity to ship. Once I think it was a sailing vessel, and once I think it was another steamer. Permission was asked in London and given.

Q. Did these firms of Norton & Son and Barber & Company furnish you during that time with a statement of their net tariff rates?

A. The tariff rates were always named from time to time to us, almost daily. We had to keep in touch with it. And the tariff rates were also named at so much per ton, plus 10 per cent. In addition to the net tariff rate, when we came to ship, another amount was always asked of us; 10 per cent. on the amount of the freight. That was charged separately under a heading of primage on all bills

of lading. We did, as I recall it, during that period receive the Plaintiffs' Exhibit A, namely, the circular of December 31, 1898.

During those two years, 1899 and 1900, there were no vessels that we could ship by except the lines of the conference. There were no vessels. There were no steamers, and there were only a limited number of sailing vessels. And in reference to the sailing vessels, on three occasions some of our customers in South Africa asked us to ship the goods by the sailing vessels, and when we applied for permission from the New York agents of the conference line to ship by sailing vessels, it was denied. I think on one occasion so-called immunity was granted, after consulting London by cable. This was all I think that was shipped outside of the conference lines.

153 The Hansa Line announced to the trade, I think as early as May 7th, that they were going to establish a regular service to South African ports in competition with the conference, and I think the first steamer was advertised for early June. The announcement was made that sufficient tonnage will be supplied to take care of all of the cargo.

The Hansa Line continued to dispatch vessels, I think four or five in number, until I think somewhere, October 25th, 1901, of that same year. Then the Hansa Line joined the conference and adopted the same system of charging freight with primage, etc. During that period of four months the Hansa Line did not charge any primage. They were net rates. During that period of four months the rates which the Hansa offered to shippers, varied from day to day. On the whole, they were substantially lower than the rates of the conference lines. I should say they were at least 15 per cent. lower, and as much as 35 per cent lower—even 40. We did not avail ourselves during those four months of their offers to carry at those lower rates.

Q. Now, will you please state how much money was paid as primage by your firm to Barber & Company, agents, between May, 1899 and September 30th, 1902, giving in each instance the date, the name of the ship, the name of the port, the marks of the consignment and the amount of primage?

A. Well, I have all the information. I can answer this question.

Mr. KIRLIN: That is only asking him to read on to the record the paper which my friend holds in his hand.

I was the one who attended to these transactions, who paid the amounts of the freight and primage. I was trying to collect all this primage all these years. I had absolute charge of it.

154 By the COURT: Those entries in the books of the payment of the primage were made by the clerks in our office, by my direction.

By Mr. BAYNE: But I had the original information. I had to give them the amounts and the numbers. This statement was prepared by me—that is, under my direction, checked by our cashier, and brought back to me to receipt the figures. I practically compiled this myself. The bills of lading are in court and this state-

ment was made from the bills of lading together with the books item by item. When it came to shipping goods we were not offered any option of paying less than the net tariff rates plus the ten per cent. We had to take that or not ship at all. When the Hansa Line joined the conference, the rates advanced about 33 to 40 per cent.

By Mr. KIRLIN: The rates of the freights charged.

By Mr. BAYNE:

Q. The Hansa rates rose to that?

A. The conference lines.

The rates of the conference lines had been lower during the period of the Hansa competition—from 45 shillings and 10 pence they declined to 30 shillings. But they were not as low as the rates offered by the Hansa Line. During the competition of four months of the Hansa line the conference lines reduced their rates from 42 and 6 pence per ton to 30. They did not reduce as low as the Hansa Line. The Hansa Line was offering rates substantially lower. As soon as the Hansa competition stopped the rates advanced to 155 the old basis, 42 and 6 pence. In the month of July, 1901, we did receive an order for wheat from South Africa. That order was received by cable. All this business was done by cable. That cable has been lost. I made a search for it, in the place where such cables were kept. In fact, I had that cable in court at the last time, and in removing the documents from court—we haven't it in our office—I made diligent search, and I cannot trace the cable. I am positive that we had it at the last trial. The order was for 16,000 bushels—in rough figures, 400 tons of wheat. The amount per ton they offered to pay us was about \$50 per ton. This house was Kaffrarian, and they were regular customers of ours; good people who paid their bills in cash.

The COURT: When was that?

A. July 19th, 1901.

Mr. THACHER: Is this testimony allowable? If it is, I suppose it goes to the point of some special damage. No such damage is pleaded, as far as I can see it in the complaint. Special damages must be pleaded. This is not a case of contract where there is a violation of a right. The damage is of the very essence of the cause of action.

Mr. BAYNE: We allege that there are two causes of damage. One, illegal exactions of amounts greater than reasonable freight rates, namely, the rebates, forfeit money. We allege in the complaint, further, that we were damaged in our business, which is what the statute permits us to recover damages for, in the additional sum of \$10,000.

The COURT: It seems to me to be an allegation of general damages.

Mr. THACHER: I concede the sufficiency of the allegation in respect to the 1,000 pounds. That we shall dispute on other grounds. But beyond that, there is no allegation whatever to cover that which counsel is now seeking to go into, except

these words at the very end of the complaint, and that he was further damaged in the sum of \$10,000, or something to that effect.

Mr. BAYNE: In his business.

Mr. THATCHER: I know. That does not allege any fact which can be taken issue with.

The COURT: You want to know specifically from what source these damages arise. You could have moved to make the complaint in this respect more specific.

Objection overruled. Exception by defendant.

Recess.

The rate asked by the conference lines at that time to transport wheat was 42 shillings and 6 pence per ton plus 10%, the so-called primage charge of 10%.

At the rate which the conference lines demanded as freight and as primage for carrying the freight in question, and at the rates at which I could buy wheat in the market at that time and the rates at which I could secure insurance, I could not have delivered to South Africa the four hundred tons in question at \$50 a ton except at a loss. At the same time the Hansa Line was offering there a rate of 26 shillings net per ton of 2,240 pounds; the steamer Argensfeldts. At the rate of freights and insurance then existing we could have executed the order for Kaffrarian at a profit. Four hundred tons at \$50 is \$20,000; our profit in this would have been approximately between \$450 and \$500 in that transaction—\$500.

157 Mr. KIRLIN: Your Honor, I presume it is not necessary for us to repeat the objection that we made to this line of testimony when we originally started in upon it, on the ground that this is a special damage and not a general damage?

The COURT: No. You may have an exception.

Mr. KIRLIN: It covers the whole line?

The COURT: Yes.

Subsequently the Hansa Line offered to carry a similar quantity of wheat at 17 shillings and six pence.

Q. How soon after this?

A. The first transaction I speak of was July 19th; the other was about two weeks later.

Q. The offer of Hansa was about two weeks later?

A. About two weeks later. No, it was July 24th. We had an offer of 17 shillings and 6 pence per ton of 2,240 pounds net.

At the rates of wheat in the market and at that prevailing rate and insurance, had we been allowed to ship at the rate offered us on July 24th, 17 shillings and 6 pence, our additional profit would have been 275 pounds, which approximately is about \$1,350 to \$1,400. I say additional profit. I mean the difference between the 26 shillings rate and the 17 shillings 6 pence rate. Had I executed the order I would have had a profit of \$450 to \$500. Had I executed the second order a week later, we would have had a profit of \$1,375 to \$1,400. That was a separate transaction. At the time of this second order the rates which were offered by the conference lines were

not such as would permit us to ship at a profit. That order was never executed because the rates of the conference lines were 42 shillings and 6 pence, plus 10%, so-called primage. We made several attempts to have the conference lines permit us to make

158 these shipments at a rate that was profitable. They declined.

At the time of the first transaction, July 19, 1901, the conference lines held in their hands a considerable amount of money which had been paid as primage.

On July 10, 1902, we received orders from South Africa, from East London, accumulated, 1,250 tons of wheat, flour, samp, corn meal and corn; they are all cereals. Out of that entire quantity the conference only gave us room on two steamers. On one steamer for 100 tons and on a second steamer for 100 tons. At a rate which permitted us to ship the goods, at which we made a profit. I repeatedly asked them to ship the balance at a rate which would enable us to make a profit. They declined. At the rates that they stated they were willing to ship the 1,050 tons we could not have delivered the order at a profit at the price at which the buyer was willing to pay for it.

At that time there were competing lines offering rates in the market. The competing line was the Prince Line. The Prince Line at that time was offering us freight room for the amount of orders we had on hand at 15 shillings net. That means per 2,240 pounds. I did ask permission of the conference lines to let us accept those rates, without sacrificing our primage money, and they declined. We had a considerable amount of primage money at that time. At the rate offered by the Prince Line, had we accepted the rate and shipped by them, our profit on the orders in question for 1,050 tons would have been \$1,200. We did not carry out that order with the exception of 200 tons. That was because of the primage they had in hand against us. We asked of the conference lines permission to accept this Prince Line offer without forfeiting our primage money. They declined.

159 Mr. BAYNE: If your Honor please, as we stated to you, there are various figures which we think we can work out between ourselves and economize the time of the Court and jury if an adjournment is granted now and we return in the morning for that purpose. I cannot further examine the witness because the figures in question fall in in connection with the examination.

Mr. KIRLIN: I am sure we can make agreements about these figures which will save a great deal of time if your Honor will grant this motion.

The COURT: Gentlemen, you have heard what counsel have stated, and we will take an adjournment at this time in order to expedite the trial, and it will probably eliminate listening to a lot of testimony, and I will adopt the suggestion of counsel and adjourn.

Adjourned to Wednesday, April 21, 1909, at 11 a. m.

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NEW YORK, April 21, 1909.

ADAM SULIMA, resumes the stand.

Direct examination continued by Mr. BAYNE:

Between April 15, 1899, and June, 1903, the total amount paid by the plaintiff to Norton & Son and Barber & Company, as net freight rates and as so-called primage, upon shipments between New York and South Africa was in rough figures, \$180,000. I can give you specific figures if necessary, year by year.

In 1899 we paid Barber & Company \$22,280.67. 10 per cent of that, that is, \$2,228 was charged or paid as so-called primage. The total amount paid to them was \$22,280. That included the 160 10 per cent charge. In the same year we paid to Norton & Son \$15,962 freight money, inclusive of the charge; that also includes the so-called primage. Wherever I give the figures I give the total payment, including money we paid as net freight rates and also the money paid or collected as so-called primage.

In 1900 we paid to Barber & Company \$24,038.01, and to Norton & Son \$23,645.04.

In the year 1901, we paid to Barber & Company \$22,902.98. In the same year we paid to Norton & Son \$30,167.52. To the Hansa line, which at the end of this year also formed part of the conference, \$880.75.

In 1902 we paid to Messrs. Barber & Company \$12,845.09. In the same year we paid to Norton & Son \$11,180.65, whilst to the Hansa line we paid \$6,619.71.

During 1903—that means to say, the first part of 1903 up to the time we started this suit, we paid to Messrs. Barber & Company \$3,241.34. To Norton & Son we paid \$2,802.94, and to the Hansa line \$2,550.63. The total amount that we paid as so-called primage during the total period amounted to \$17,911.75. Out of that sum, roughly speaking, we received back about \$12,000—not hardly that, because they still owe us about five thousand and some odd dollars. They stated to us the grounds on which they declined to pay us the sum which has not been paid, namely, the sum of \$5,000. They stated that the reason of non-payment was that our customers in South Africa to whom we made shipments were disloyal; not that we had been. Up to that time we were loyal to the company. We were loyal up to, I think, the end of 1902. It was November, I
161 think—October or November, 1902. I can give you the exact date if I look it up.

Q. The refusal to pay the so-called primages back relative to those was that based upon the fact that your consignment had been shipped to competitors, or was part of it based after that time to the fact that you had shipped through competitors?

A. No, all of that. I think there is a part of that money that they did not return to us, because at the end of 1902 we had shipped by the opposition lines, and they told us so.

By Mr. KIRLIN: The date up to which our loyalty extended was about August 15th, when we sought advice of legal counsel to find

out. The position became so intolerable that we had to seek advice of counsel, to see whether those rebates were collectible. We had orders on our books that we could not execute, and we wanted to know how we stood. The date was after August 15th, 1902.

Mr. BAYNE: I offer in evidence a stipulation relative to certain enumerated shipments. Will you please mark it in evidence and then I will read it.

Received in evidence as Plaintiffs' Exhibit A-2.

This statement comprises only those shipments upon which the conference lines declined to return the amount which had been charged as primage. It does not include any other shipments except the ones upon which the conference lines have not returned to us the 10 per cent charge as primage. Referring to my testimony of yesterday relative to an order received on July 19th, 1901, for some

400 tons of wheat from Kaffrarian, which I testified I did not
162 fill, because to fill it at a profitable rate would have involved our forfeiting the 10 per cent. the aggregate of the 10 per cent. held by the conference amounted to at that time between \$2,600 and \$3,600. I think I will go back of this. It was more than that. It was not less than \$3,600—between \$3,600 and \$4,600, I think, would express it more exactly. It was what had accumulated during the period of 15 months preceding, so that it was a choice between making the \$450 to \$500 profit on that shipment and as we supposed sacrificing the \$3,000 to \$4,000 of 10 per cent. That was the same situation that confronted us when we refrained from making the shipment, filling the orders five days later, on which I testified that our profit would have been \$1,375, and that was the same reason that prevented us from filling that order.

In 1902, when I refrained from filling an order that I have testified the profit would have been \$1,200, the accumulation of the so-called primage was not less than \$4,000.

During the period that the Hansa Line was in competition, namely, from June, 1901, until October 27th, 1901, I was familiar with the rate which it offered to carry freight for. I have prepared a statement showing the amount which would have been saved on each shipment made by us during that period. I have prepared a statement in which I have shown how much we have paid for freight, so-called 10 per cent., during the period that I have referred to, from June 19th, 1901, until October 19th, 1901.

By the COURT: During that period of time we had 36 shipments to South Africa by the defendant lines. The statement which

163 I have prepared also shows what the character of the shipment was in each case, and the name of the ship, and the actual freight paid to the conference lines on the shipment. The amount here stated includes 10 per cent. The statement also shows at which rate the Hansa line was offering on the same date to carry the same freight to the same port. It places that figure side by side with the figure which shows the amount which we paid to the conference lines for that same freight. The statement also shows a

computation of the difference between the two in each case; it is a statement prepared by myself.

Mr. BAYNE: I also offer the paper referred to by the witness.

Mr. KIRLIN: I object to it as incompetent, irrelevant and immaterial, on the ground that there is no foundation laid for any such comparison, no proof that the Hansa line shipped or would have shipped these shipments at those rates; no proof that the shipments that were made by the conference lines during that period were other than entirely voluntary shipments, each being governed by its own contract.

By the COURT: You say those were the published rates of the Hansa Line?

Mr. BAYNE: Rates that it offered to this witness to carry its freight for.

Q. What is the fact as to that?

A. The fact is that the agents, Funch, Edye & Company, the recognized agents of the Hansa line, met me on the floor of the Produce Exchange.

We had shipped by this line for many *many* years through other companies.

164 By Mr. KIRLIN:

We never shipped on that line to South Africa before 1901.

By the COURT:

This rate was given us verbally from day to day. I would be approached on the floor, and I would be asked whether I had any cargo to offer. What is your rate? The rate was so, and I kept a record of that.

Q. Did you go on the exchange for the purpose of ascertaining rates?

A. I was on the Exchange every day for the last twelve years with very few exceptions. That is where the merchants meet the steamship agents, and where the contracts for freight are made. I know about the Hansa line as to what kind of a line it was. It was a very large and powerful line of steamships. That line dispatched during the time of the competition four if not five large steamers. They had a great many steamers plying to India—very large and powerful steamers, a German Line. I find from our records supported by the bills of lading, that we have made about that time, four shipments by steamer York Castle between June 19th and June 24th, the steamer York Castle, belonging to the conference lines. First shipment the date is June 19th, four thousand cases of petroleum on which we paid to the conference lines the rate of 30 shillings 6 pence plus 10 per cent., amounting in all to \$1,686. At that time the representatives of the Hansa Line were begging us for cargo to South Africa, and were offering us at the rate of 20 shillings net. So the rate of 20 shillings net, the freight on those 4,000 cases, would have amounted to \$891.14. The difference between the two in favor of

the Hansa Line was \$709.72 in freight. By shipping by the
165 Hansa Line we would have paid that much less than the
rate we paid. That is one shipment we made on the York
Castle. Shipment by shipment, I have the bill of lading and in-
voice after invoice, and all the freight paid with it.

The next one is a shipment also by the York Castle to East Lon-
don—or, the port is not mentioned. The rate paid was 45 shillings
plus 10 per cent. The amount was only very small—it was \$11.56.
The rate offered us by the Hansa Line at that time was 30 shillings
per ton net. The freight on this little shipment would amount to
\$7.56 difference. Then we made another shipment by the York
Castle at the rate charged, 45 shillings plus 10 per cent, \$230.39.
The Hansa rate at that time was 30 shillings. The offerings were
made prior to the time of this shipment. That was always done,
in every case. The vessels then were brought here to fulfill the
contracts. Engagements were always made ahead of time.

The COURT: What did you mean, witness, when you said the
Hansa people were soliciting you to ship commodities to South
Africa?

The WITNESS: The Hansa line—our business is very large, and
as soon as they determined to enter the South African field, they
approached us, asking for patronage; asking us to give them a share
of our cargo. We asked them, would they have any facilities for
shipments to South Africa, and they said they had a powerful fleet
of vessels, and they would provide sufficient tonnage to meet the
accommodations.

By the COURT: The agents of the Hansa Line, Messrs. Funch,
Edye & Company, said that?

166 By Mr. KIRLIN: They had one boat a month. That is my
best recollection.

Mr. KIRLIN: I will withdraw the objection I have made, in so far
as it bars the use of the paper. That is a statement I don't want to
take up time to have to read these things all over, but I want to
adhere to my objection on all the other grounds.

Mr. BAYNE: That is the objection, then, under which the paper
identified by the witness is offered in evidence.

Mr. KIRLIN: I will agree, for instance, that he will say that he
made the shipments shown on that paper, and that he had offers of
rates as shown on that paper.

The COURT: From the Hansa Line?

Mr. KIRLIN: Yes, sir.

The COURT: Moreover, that the Hansa Line had the facilities—

Mr. KIRLIN: Oh, no, I won't. That is why I have objected to
the paper.

Said paper is received in evidence as Plaintiffs' Exhibit A-3.

The COURT: Was the rate of shipment by the Hansa Line the
same as that charged by the so-called allied lines, save the primage?

Mr. BAYNE: No, sir. Far less. The total amount during those
four months, the difference is \$8,485.45.

By JUROR No. 3: We got a rate from the Hansa line on each sep-

arate shipment mentioned in this paper. There will be a rate given for grain, a rate given for petroleum and a rate given for all those commodities which was shipped.

167 By Mr. BAYNE: On each occasion when we refrained from accepting the offer of the Hansa line, the amount of accumulated 10 per cent. that the conference lines held in their hands was never less than \$3,000. They always had from that to about \$4,000 or \$4,500 in hand. So that, in each instance, it was a choice between getting the benefit of the Hansa rate, and the amount of rebates or 10 per cent, which the allied lines held in their hands.

We did not have any assurance that the Hansa competition would continue in each case. We were not afraid of the discontinuance, we were afraid they were going into the conference. The competition discontinued after four months. When it went into the conference the rates went up from 26 shillings and 20 shillings, and even 17 shillings, they went up to 42 shillings and 6 pence plus 10 per cent. from the different rates they quoted us during the fight, as low as 17 shillings—17 shillings 6 pence, 20 shillings, all kinds, after the fight, so from that they went to the rate of 42 shillings 6 pence plus 10 per cent., which was the conference rate, and had been the rate before any competition came. When the Hansa line went into the conference that did not leave any other line in competition for some time to come, until the Prince Line came in in 1902.

Q. What was the date when the Prince Line first entered into the South African freight business?

A. The very first intimation we had from the Prince Line was March 14th, when they issued a circular announcing that they were about to inaugurate a regular service to South Africa. The first steamer they sent June 14, 1902.

168 The rates which were charged by the conference lines after the Prince Line entered the competition were substantially reduced. Taking grain, the rate of the conference lines during the period after the Prince Line came into the competition, in March, 1902, was 42 shillings 6 pence plus 10 per cent. In April, 1902, it was 32 shillings 6 pence plus 10. When I speak of 10 per cent. I mean the amount charged as primage. In May, 1902, the same rate prevailed, 32 shilling 6 pence plus 10 per cent. In June 32 shillings 6 pence plus 10 per cent. During the months of July, August and September and October the rate changed daily; they were given one day and withdrawn the other. Sometimes the rate was named as low as 10 shillings, and there would be very little room available. The bulk of the grain was carried at 32 shillings 6 pence.

By the COURT: There was no fluctuation in the rate at the time the Prince Line came into the field, with the one exception, when the Hansa Line entered into the competition.

By Mr. BAYNE: When there was no competition the rate hardly ever changed. When there was competition the rates of the combined lines went down invariably.

I had an offer of rates from the Prince Line for the carriage of goods to cover a long period of time. (Referring to paper.) This is the offer made to us in the contract. The Prince Line actually

shipped at those rates for us, in accordance with the offer. As far as I recollect, that offer was accepted at 20 shillings. For a period of six months they contracted to carry grain at 20 shillings a ton. They offered us in October, 1902, for six months, that is November, December, January, February, March and April. The rates charged by the conference lines during that period fluctuated, but they were invariably higher than the rate of 20 shillings 8 pence. They were 32 shillings 6 pence, plus 10 per cent.

Prior to the beginning of the competition of the Prince Line, compared with the rate offered by the Prince Line, the rates of the conference lines were 25 per cent. higher; they were 42 shillings 6 pence, plus 10.

By Mr. KIRLIN:

Q. Did you say that the conference lines' rates were 32 shillings 6 pence for six months after October, 1902?

A. After October, 1902—no, I did not say that. It was prior to that but not after October, 1902. During that period they were 32 shillings 6 pence, plus 10. For the six months during which we had this contract with Seager, the rates were higher than our rates. The rates varied from 18 shillings 6 to 27 shillings 6. They changed from day to day and from week to week. The Seager rate was 20 shillings.

By Mr. BAYNE: The Seager is the Prince Line. The Houston Line, besides the Prince Line, offered to carry at those rates for us.

Mr. BAYNE: That is all, with the exception of the computation which the witness will have to make at recess.

Cross-examination by Mr. KIRLIN:

The plaintiffs are the firm of Thomsen & Co. I am not a member of that firm. Mr. Thomsen is the senior member of the firm, and Mr. Riedel is the other New York partner. At the previous trial of this case before Judge Hough both of them were in New York. I was to be called as a witness on the previous trial. I was not called. Mr. Thomsen and Mr. Riedel were witnesses on the previous trial. Mr. Thomsen was called first and followed by Mr. Riedel. They gave all the testimony that was given on behalf of the plaintiff at that trial. I heard it. I was in court. I said that the firm during the period we are concerned with, conducted two classes of business to South Africa; one a commission business and one a sales business.

The class of business we are concerned with in this action is the straight sales, C. I. F. business. That means sales on the basis of the price including the cost, insurance and freight.

Q. The method of conducting the business was that you received bids by cable from your consignees, or you cabled to them bids on certain fixed terms including cost, insurance and freight, and the contracts, when closed at all, were closed on that basis, is that right?

A. We sold at a fixed price including delivery in South Africa.

Q. Please be good enough to answer the question?

A. Yes.

Therefore, in determining whether we could make a sale, one of the things that we had to determine was the amount to be included for freight.

Q. And whatever amount was included for freight was charged to the customer as part of the sold price, was it?

A. No.

We sold at an agreed price. We had to figure in our price the cost of the goods, the insurance and the charges, cable expenses and profits, and everything. Our contract was to deliver the goods to the consignee in South Africa at a net price.

171 When we first began this business I know how we treated the 10 per cent. primage, whether it was taken into account as part of the freight as between us and our customers. The fact about it is that when we established our so-called indent business which I testified to yesterday, a very small portion of our business, by request of our consignee we discounted the 10 per cent. That means we did not take the 10 per cent, in consideration of the indent business.

Q. But you say we are not concerned with the indent business. All I am asking you about is the C. I. F. business?

A. The C. I. F. business we took the freight into consideration. You asked me a little while ago whether we changed our method.

Q. I am talking about the business we are concerned with, the C. I. F. Forget about the indent business, because you say it is not involved. Tell me how you dealt with the trade on the C. I. F. business in the beginning and whether you made any change about it, and if you make a change, when you made it?

A. In figuring our C. I. F. price?

We figured the lowest price at which we could obtain the grain or the given commodity, and took into consideration the insurance and the profits.

Q. Did you include the 10 per cent. in the freight which was charged to the consignee?

A. It was never charged to the consignee, the C. I. F. sales. We were not producers ourselves of these products that were shipped. We are not grain growers. We went into the market and bought grain, and negotiated the insurance and the freight.

Q. You made purchases each time to fill the order that you got; you did not carry stocks on hand?

A. No, sir.

172 Q. Do you remember Mr. Thomsen, your principal, testifying as follows on the previous trial:

"Q. Didn't you claim at the time that they belonged to what you called your principals in South Africa? A. I don't know. There may have been some later on. Now, you were asking me a little while ago whether we calculated this 10 per cent in or not. I said we did not at the beginning. Later on we did."

"The WITNESS: I could not tell that offhand when we did begin

to make an alteration in our method of doing business between us and our principals. Perhaps my partner will know the date."

Q. Do you remember that?

A. I remember it perfectly.

Q. Do you remember he also testified:

"Q. When you did change it how did you change it? A. Then we included this 10 per cent in our offers.

"Q. In the charge to your customers? A. In our offers made we calculated the full amount of freight, if you are pleased to call it, including the 10 per cent.

"Q. You charged the full amount of the tariff rate and primage to your customers, and when you began to do it that way did you continue to do it that way up to the time of the beginning of this action? A. I think we did. I could not say positively. I believe we did.

"Q. Was it not in 1899 that you changed your method of dealing with the 10 per cent commission in your account with your customers in South Africa? A. I really don't know when we started. I would have to get the data on that."

Q. Do you remember his testifying to that?

A. I remember it perfectly.

Q. Do you remember that Mr. Riedel was asked about that:

"Q. That was in December of 1900? A. No, that was the beginning of 1900. I believe it was February or March, something like that, 1900."

Q. Do you remember that?

A. I remember it, yes.

The largest business that we have done with the south was the staples, such as petroleum, grain, that is, wheat, corn, all kinds of cereals, flour, corn products, samp, corn meal and oats. It is not entirely with those commodities that these items in controversy are concerned, because we shipped, for instance, large quantities of canned goods; canned goods and those big staples.

Thomsen & Co. had been in business here in New York sixty-five years, I think; more than that. They first began to do business in Africa in 1899; and they began to deal there in the staple products that I have referred to. Besides that we also had to take some general merchandise, which is the indent business to which I referred.

When we entered into that business we never saw those rebate circulars. The conditions of the trade were explained to us verbally by different agents in South Africa. I myself gathered that information before starting on my trip to the South; and through Barber & Co. and Mr. Benedict, and all the information by which I was thoroughly prepared to do that particular business. We didn't see that circular until after. Never having seen the circular

174 when we started in business we could not have started on the basis of the circular. We started in business by making shipments. On the back of the circular there was a blank to be filled out and signed by anybody who wanted to comply with the circular and claim the return commission which is provided for.

Q. Did not you or your firm sign that blank application for the

return of the commission of 10 per cent on the very first shipment you ever made to South Africa?

A. Yes, it was given to us verbally.

On some of the shipments we got it. During the period we were dealing with the conference lines we paid them freight aggregating \$180,000.

Q. All those were made or intended to be made pursuant to the terms of the circular, were they not; all the shipments on which those freights were paid?

A. All the shipments were made in the execution of our orders?

Q. Answer the question?

A. I don't understand the question. I mean to answer every question.

Q. Were not all the shipments in respect of which these freights were paid aggregating \$180,000 made or intended to be made on the terms of that circular?

A. Yes.

In respect to all shipments on which we paid the aggregate amount of \$180,000 freights, we filled out the blank on the back of the circular and claimed back a return of 10 per cent commission. In pursuance of those applications we did receive back 10 per cent commission on all shipments except those that we are concerned with in this proceeding. In round figures the amount of commissions of 10 per cent as paid back to us was approximately \$12,000 and odd. The total amount that we asked to have 175 paid back to us in pursuance of those circulars was between \$17,000 and \$18,000. That included the \$12,000 and odd that we got back.

Whenever we made a shipment in respect of which we made a freight payment we got a bill of lading. That is, each shipment was covered by a written contract with the ship; and that bill of lading in each instance contained on its face the contract covering the amount of the net freight and the 10 per cent primage. We had those bills of lading in every instance, prepaying freight.

Q. So that in every instance Thomsen & Co. had a contract with the steamship company to pay the amount that they did pay for freight and the amount that they did pay for primage?

A. We paid according to our freight negotiations.

We had a contract to pay those amounts in every instance; that is, the contract was to pay the amount shown on the face of the bill of lading. The freights and the primage, in all our C. I. F. business done with the conference lines, were on the basis of the payment of the freight and primage.

Q. Did Thomsen & Co. in practice pay the freight in cash when the bill of lading was delivered to them?

A. We always gave a check for the total freight when the shipment was completed.

Q. Are you not in error about that? Did you not always first take up a bill of lading by a due bill?

A. Shall I explain how the payments were made?

The ship was loading two or three weeks; when the bill of lading

was ready it was delivered on Monday, for instance, at our office, and then a due bill was given. Another on the following Saturday and a due bill given; two next week. A single steamer would have five or six bills of lading. After the last shipment went forward those due bills were added and a check given for it; so that
176 one payment was made and one check drawn. So that in practice as each bill of lading was delivered to us we gave a due bill for it. That was a promise to pay the amount stated on the face of the bill of lading. After we had accumulated all our bills of lading on the ship we made a check for the amount of our due bills and paid it to the ship's agent and got back our due bills. That was done on each particular ship.

Q. Is it your testimony that Thomsen & Co. were the only people who were interested in this 10 per cent. return commission on all C. I. F. shipments?

A. Thomsen & Co. were the only people.

Q. The only people that were interested in the return of the 10 per cent. commission on all the shipments?

A. I don't remember having testified to that. On the C. I. F. business it belongs to Thomsen & Co. It was our own business.

Our consignee did have an interest in having us ship in many instances on the conference lines instead of on competing lines. Some consignees gave us instructions not to ship outside of the conference because they had received shipments from other New York firms through those lines, and they would not jeopardize the rebates on those shipments. From some of the consignees we had instructions to confine ourselves to the conference lines.

Up to August, 1902, the rebates or return commissions which ultimately were not paid, were withheld on the express ground that the consignee had received shipments by the opposition. After August 15, 1902, the ground was that they shipped by the Houston and Prince Lines. The second half of 1902 we had shipped by the Prince Line, and we told the conference lines. They were perfectly aware of it.

177 Q. After 1902 did your firm sign the application for the return of the 10 per cent?

A. We talked about the 10 per cent.

Q. Did you sign the printed application?

A. Those blanks had to be signed anyway, because they would not accept the application on any other blank except those. We signed those blanks.

Q. Did not those blanks say that the firm signing them had not made shipments on any opposition line?

A. We have signed that blank, yes.

I don't think we signed any application after 1902, because after we went over to the opposition the syndicate line made us a net rate. In the second half of 1902 we had net rates, but they knew we had made a contract on the Prince Line and the Houston Line.

By Mr. BAYNE:

Without primage, after we had gone to the opposition. So I do not think, speaking from memory, that we claimed it.

By Mr. KIRLIN:

Q. Does that mean that Thomsen & Co. are not making any claim for return commission after August 15, 1902?

A. We are making claims, yes.

Q. On what ground?

A. I don't know that we have any primage due us during the time that you mention.

Q. On what ground are you asking for it after 1902, if you did not pay any primage and received merely a net freight without any promise or without any application for the return of the 10 per cent?

A. From memory speaking, I do not recall that we claimed in that period. My impression is that there was no claim after August 15, 1902, on grain shipments. We made claim on shipments of other merchandise, but not grain. I cannot answer your question without refreshing my memory, as to the period for which we claimed. I mean the second half of 1902; I will qualify it that way. I did not say from August 15, 1902, Thomsen & Co. had net freights on all their shipments from the conference. I said some offers of net rates were made us for grain and petroleum by the syndicate lines.

Q. There was freight with 10 per cent primage after August 15, 1902?

A. Yes; the net rate. There may have been claims for return commissions on shipments other than grain. I could not tell you without looking. Probably there may have been. We made shipments by the Prince Line and there was 10 per cent, and we ultimately claimed the so-called primage. If there were any applications made for rebates after August 15, 1902, they were made on the standard form of application.

Q. And the fact was that those standard forms of application contained a statement that your firm signed that you had not made shipments on opposition steamers, when you really had; is that so?

A. If we made them we signed with the full knowledge that the conference lines knew we were shipping by opposition lines because that was announced to them.

This order of the 19th of July, 1901, to which I testified was an order for two loads, 16,000 bushels of wheat. It amounted to about 420 or 430 tons; 4,200 bags, over 400 tons.

Q. Did you say you had an offer from the Hansa Line to carry that specific shipment?

A. I had a rate named to me by the Hansa Line to meet the shipment which it required, at the rate of 25 shillings net. It was 2,240 tons.

Q. You don't quite answer the question that I put to you. Did you have an offer from the Hansa Line to carry that specific shipment within the time that you had to make it, according to that order? Did you so testify?

A. Yes.

Our order called for July-August shipments. I did tell Funch, Edye & Co. that we had 400 tons, more or less to ship; it was a little over 400. I got an offer from them to carry it at 25 shillings, within the period of shipment specified. I didn't let them have it, because I could not. I was tied up by the rebate. I approached the syndicate line and asked them, "May I ship by the Hansa Line, or will you give us an equal rate?" They said their rate was 42 shillings, 6 and they would not give us permission to ship by the Hansa Line.

Q. Your claim is that there was not anything binding about this agreement?

A. There was the money owing us.

Q. Would you, in your opinion, have been entitled to that if you made a shipment by the Hansa Line?

A. We did not make the shipment.

Q. If you had a chance to save \$400 why didn't you avail yourself of it?

A. Because we would have lost our \$3,000. They would have stopped the payment of the \$3,000.

Q. Did you subsequently get the \$3,000 that you would have lost if you had made this shipment on the Hansa Line?

A. No, I did not get all of it. They are still owing us \$6,000 and odd.

Q. Your position is that you did not get the rebate and you did not save the \$400?

A. I did not execute the order. I testified that the order was not executed. The order could have been executed; it was not.

Q. You thought that you ought not to make that shipment on the Hansa Line boat and then claim the 10 per cent. under the rebate system?

180 A. I felt I was entitled to the market rate, and the syndicate refused us the market rate, telling us, "If you ship you will be disloyal and you will be penalized." And we have also got several thousand dollars at stake.

Q. You don't answer my question. Did you think in view of your relations with the syndicate under the rebate system you ought not to ship by the Hansa Line without the consent of the syndicate?

A. At that time—

Q. All I want to know is what you thought?

A. At that time we thought we would lose our rebate if we shipped by the Hansa Line without immunity.

Q. Did you think you ought not to ship on a Hansa ship because of your relations with the conference line under this rebate system? That is what I am asking. Did you think that?

A. I must be dense. I can't understand that question.

Q. We will let it go. Now, what was the next order that you testified to?

A. July 28th.

That order was for another lot of grain. I have not got a copy of the order. It came by cable. I testified yesterday the cable was lost. I said all those cables. This cable was lost. I have a record that shows what that order required as to the time of execution.

Q. What have you that enables you to remember what the time of executing the second order was?

A. Our own records, our correspondence.

It shows that we had an order here for August-September shipments in two lots of grain. That was also about 400 tons. We received that on the 26th of July.

Q. There was no Hansa Line steamer in port at that time?

A. The Hansa Line was trying hard to secure a cargo for 181 a steamer. I approached them with an offer of 22 shillings 6 pence, asking if we could not give them a cargo at that rate.

Q. This order that came on the 26th of July was to carry it on the Argonfeldt?

A. No, it was not to carry it on the Argonfeldt, except it was an order that was received by us which could not be executed on account of the high rate which was exacted at that time by the syndicate line.

Q. You are on another matter now. You received the order on the 26th of July, you said. Was there a Hansa Line boat in port then?

A. Whether a Hansa boat was in port I could not answer, but there was a Hansa Line reachable that I did specify for shipment.

Q. What was the boat that you had an offer to carry it by? No boat was specified in the order?

A. The order came for June-July shipments or July-August. No boat was ever specified.

I had an offer from Funch, Edye & Co. to carry it on the Hansa Line boat. I couldn't say what boat. They had a boat.

By the COURT: It was one of the Hansa Line steamers.

By Mr. KIRLIN: I couldn't tell you whether they had a boat in this port between the 21st of July and the end of that month. I could not tell whether they had any boat here during August. My order was June-July, August-September ships, and they surely had two boats. They offered us tonnage.

Q. Do you know they surely had two boats here during that time, from the 21st of July to and including September?

A. What I know is they offered us tonnage for our shipments. They had four boats there during the month.

182 Q. Please don't say "surely."

A. I beg your pardon. "Presumably," then.

Q. According to the table that has been put in there was actually only one boat in port after the 21st of July, including all of September and twenty-nine days of October. Does that change your recollection any as to what you testified?

A. The facilities were not ours; the facilities were of the Hansa Line. The Hansa Line offered me tonnage for specified ships. They would leave it to their contract. They offered us for a specified shipment but not for a specific steamer.

By Mr. ULLO:

Q. A specified month?

A. That is what I mean; a specified period of shipment.

August and September in this case. In July we were booking for August and September.

By Mr. KIRLIN:

Q. Why didn't you let them have that shipment if they could carry it?

A. The same reasons that I stated before.

Q. You were not disappointed with regard to any other shipment until July 10, 1902?

A. I was disappointed in numerous orders, except that I could not bring them to my memory. Those are three salient cases that I selected because I could recall them. That was about eight years ago.

Q. This is the only one that you were sufficiently disappointed about to bring to your notice July 10, 1902?

A. Yes.

This order was an aggregate of 1,250 tons, composed of wheat, flour, corn, samp and corn meal, I think, and oats. That was coupled with a restriction as to the time of shipment. All our orders were for a certain time for shipment. The time for shipment on this order was, as far as I recollect, July-August. We could ship in July and or August.

I could not say whether there was an opposition boat in New York in a position to take that 1,250 tons during July and or August, 1902. There was *was* an opposition line offered us freight to be furnished in that specified period of shipment. About the boat I don't remember. I had a contract and the firm refused it, with the Prince Line, to carry during those two months. We shipped a part of that on a conference line steamer; 100 tons in July and 100 in August. We got a cut rate on both, about 10 shillings.

Q. You knew very well that was not a remunerative rate, didn't you?

A. That was the rate they offered us.

Q. Won't you answer the question? You knew that was not a remunerative rate, didn't you?

A. I did not think it was a paying rate, no, not 10 shillings, but we only had a very small portion of the cargo. The Prince Line offered to take the whole quantity of our orders at the rate of 15 shillings net.

Q. As a merchant you realized that that was not a paying rate, didn't you?

A. That rate of 15 shillings probably covers costs; I couldn't tell you that. I am not a steamship man.

Q. That is a cut rate as well as the 10 shilling rate that the conference were giving?

A. They didn't come down to 10; they asked 15. They offered to carry a large portion of cargo at 15 shillings, net.

Q. You realize that that was a cut rate, didn't you?

A. That was the market rate.

Q. No, is not that a cut rate?

A. I couldn't say.

184 Q. Have you ever since you have been in Africa seen any rate of 15 shillings, except a cut rate to meet opposition?

A. On many occasions we had rates as low as 10 shillings.

Q. Those were cut rates?

A. I don't know what they call them. I don't know how they call them. I am not a steamship man.

Q. You know it cannot be carried for that with profit?

A. No, not of my own personal knowledge.

Q. Do you know anything about the shipping business?

A. I know something about it.

Q. Is it not your opinion that it could not be carried for 10 or 15 shillings with any profit?

A. I should say 10 shillings is a cut rate, but 15 shillings may have been cost. I couldn't tell you.

Q. I am asking for your opinion?

A. 15 shillings was the then going rate.

Q. You don't think that would yield anybody any profit?

A. I couldn't answer; I don't know. I have not before me a copy of Plaintiffs' Exhibit A-3. The difference between the rate of shipment actually made and the rates which I say were available from the Hansa Line.

Recess.

The order of July 10th, 1902, was an order that was received for 1,250 tons of cereals, composed of wheat, flour and corn. This order came by cable. It was a firm offer. You see we were in touch by cable with them constantly. The offer would read: We make you a firm offer for 400 or 200—whatever the quantity was, No. 1 wheat, packed in such bags, for July, August and September shipment, for 11 shillings 3 pence per hundred pounds. I am giving you an imaginary price, whatever it was. I have a note. At that time it was about \$45 per ton. This was wheat. Wheat at that time 185 was about 92 cents per bushel approximately speaking. 8,000 bushels approximately speaking, is 215 tons.

Q. You did not state to the jury that the order said for July or August shipment, or August or September shipment?

A. I did state so.

Q. I mean in recapitulating the order just now. Was that a part of the order?

A. The time of the order. The time of the shipment is a very important feature of the order. The order has to be executed within a limited time. I had to get the grain to carry that much. I used to buy the grain on the Produce Exchange, in the market.

Q. Can you buy grain at a flat figure deliverable in August or September at your option?

A. Always—invariably so. I did make an inquiry so as to know whether I could get the grain and from whom. That was part of my business. I used to attend to that personally. We used to buy the grain from various firms. We could have got the grain to fill this order from the firm of Henry McCord & Son. That was one

of the firms with whom we dealt very largely. Then the freight and insurance had to be considered, cost of the bags, sewing of the bags. I made an estimate on this order.

The estimate on this order was that with the rate of 42 shillings and 6 pence, then asked by the Conference Line, it could not have been executed with the limit given us.

Q. What freight rate would you have had to have in order to make a profit on the order?

A. That order could have been executed at the rate of 15 shillings per ton.

That is the rate which the Prince was offering at that time. It isn't the fact that that order was cabled to us for that limited price, especially with reference to the cut rate that was then prevailing by the Prince line, 15 shillings.

Q. It was pretty significant, the freight rate you would have to have to carry that out happened to be just the same as the Prince was offering?

A. Our customers were very largely dealing in grain. We were buying from the Argentine Republic and Australia and other parts of the world, and they were only buying from the United States at a price—if the price was the same as they could compete with the other offers, they would give us the order. If our price was high, we naturally could not execute the business.

At that time we had offers from three different people. This was offered from two different firms—I think three—I know two, the Kaffrarian steam mill, East London, John Bissikes, East London, and another firm which I cannot recall at present. I have it here in blank. Had I been able to secure the rate of freight which would have enabled me to meet the price, I would have cabled the acceptance, and it would have been a contract calling for delivery in June, July, August and September, 1902. Our mere acceptance was binding. The orders of July 19 and July 26, 1901, were firm offers.

It very often happens that we get firm offers that we cannot put through, where our customers make bids which are below the market. But you don't always get a rate of freight that will enable you to execute it, and you can't take advantage of it. Many times you cannot execute it because of the rate of the staple product. A lot of cabling done all the time, and it does not always result in business. We had numerous offers from Kaffrarian during this period. Some of them were executed. Some of them we did not execute. Our profits varied to the conditions of the market and the competition. Sometimes we made as little as a half per cent. and sometimes as much as 45 per cent. There was entirely a market condition. We had to be governed by being in touch with the trade.

Q. Now coming to these orders or offers whichever they were that are embodied in this cable, Plaintiffs' Exhibit A-3, have you any data before you which will enable you to say whether these were inquiries or firm offers?

A. The cable before me embodies shipments, actual shipments. These were shipments which we made on the conference lines between the date of June 19th, 1901, and October 3rd at the confer-

ence rates. They were made under bills of lading just as I testified all the shipments were. We have a bill of lading corresponding to each one of those entries. This is merely the difference in the rates that we could have made had we been at liberty to ship by the opposition lines. What we might have made if we had not shipped as we did ship—you might put it that way.

Q. Now these shipments I suppose like these orders you referred to carried time limitations, didn't they, with them?

A. We always had a latitude of two or three months. On rare occasions the man would require immediate shipment, but they were rather an exception to the rule.

On the first shipment that Hansa offered 20 shillings, June 19th, they offered us room for 400 cases of oil to meet our requirements with reference to the time of the shipment at 20 shillings per ton net. In making these negotiations, I dealt with accredited representative Funch, Edye & Company. Sometimes their chief, other times Mr.

Cadiz, who was then in chief charge of the African trade. I
188 can't say the most of the freight transactions were with Mr.

Raymond Cadiz. He was one of the exchange men. From the knowledge of the business and trade and from my recollection, I can say that we had a latitude of at least six weeks on any order—not less than six weeks on any order.

Q. Now, were not there intervals during 1901 of more than six weeks when Hansa would not have any ship on the berth here?

A. I can't tell you from recollection. The only thing I know, they had four steamers during the four months' competition. Whether they sailed at four weeks intervals or two weeks I do not recall.

The competition continued—the first steamer was advertised to sail June 5, 1901. The fight was over on October 5th of the same year.

Q. Now, according to the testimony that was put in, the table of sailings during that entire period, Hansa dispatched only three ships, namely the Nadenfass, which sailed June 15th, the Argenfeltz, which sailed July 21st, and the Bayenfeltz, which sailed September 8th. Is your recollection so definite about this as to enable you to state that that is not correct?

A. I think it was correct. When did the fourth steamer sail?

Q. The fourth steamer sailed October 29th, arrived here October 20th, and sailed October 29th?

A. So, you see, the intervals between any of the sailings was not more than six weeks.

Q. Now, but there were only three ships during the time you say the competition was going on?

A. Yes, but if we had a ship in early October, we might have shipped in September. We had a latitude of doing so.

Q. You have included on these shipments, on October
189 4th two; on 16th, one—two on the 16th, one on the 21st, another on October 4th, and two on October 3rd.

Q. All of which are after the departure of the last competing ship, are they not?

A. I have looked over them for October 3rd, because, according to my recollection and records, the fight between the Prince line and Hansa line was off October 10th or 15th, but if you think——

Q. I don't think anything about it. I am only asking you the question whether you have not included here a considerable number of shipments?

A. No, sir. In my opinion all the shipments are included, those which were made prior to the end of the freight war, in my opinion. I may be wrong about the last shipments, but I don't think so.

Q. I am only calling your attention to the fact that you have included in this statement here seven shipments which are subsequent in time to the departure of the last non-competing ship of the Hansa?

A. Yes. May I answer this?

By Mr. BAYNE:

Q. But not subsequent to the time they were making engagements?

A. We did not know that the Hansa would not have a steamer after that.

By Mr. KIRLIN:

Q. Now, Mr. Sulima, isn't it the fact that when you were in negotiation with Mr. Cadiz on the exchange in regard to these shipments by the opposition ship, that Mr. Cadiz would say to you, we are offering this rate on our next boat, or on our boat which we expect about a certain time, or any such thing as that?

A. If he said that, I would ask him my invariable question then, to Mr. Cadiz, what shipment do you expect to make with that boat?

190 He would tell me he expected—such and such a shipment, in September or August. It very frequently happens that the expectations of the brokers as to the time the boats will be ready are not fulfilled. But the Hansa line is a powerful line, which is perfectly willing to live to its contracts—always has.

Q. There were no boats of the Hansa on this side of the ocean, except the boats which were actually here?

A. That was their business. They are willing to make engagements, freight engagements.

Q. As far as you know, the only Hansa boats which were available to carry these cargoes were the boats which were here on the berth?

A. I didn't know what boats they had on the berth.

Q. So far as you know?

A. Oh, so far as I know, yes.

Q. Now, Mr. Sulima, on the general question of the advantage or disadvantage to merchants as well as to ship owners of relative stability of rates and regularity of sailings, would not you be willing to say that it was desirable for the interests of both that sailings should be regular and rates relatively equal and even rather than that the sailing should be irregular and that rates at some times should be high, and that before the shipments which went out on a

certain steamer sailing today another steamer would be offering to carry your products at half the rate of the departed steamer?

The COURT: You want an opinion as an expert?

Mr. KIRLIN: Yes.

Q. What is your view about that?

A. From the viewpoint of the merchant, regularity of sailings is very desirable, but we never had any from the conference. As to regularity of rates, we always welcome competition which will enable us to offer goods at prices which will enable us to compete with the Argentine Republic, Australia and other markets. We are always looking forward to those times when somebody will come in and offer us rates which will enable us to do business. In fact, our largest business was done when we went free and shipped by the Prince and Houston Lines.

Q. This was the business you did—that is all the business you did while this cutting was going on?

A. Oh, no. I said our best and largest business was done when we broke through that reign of the conference. That was in the second half of 1902, and we were free to ship by the Prince and Houston Lines, and our business was greater and more stable than it ever was.

Q. That is, you were able to do business at these very low rates as long as the competition lasted?

A. We done so in the case of the fight with the Hansa Line. Then we could not—we did not dare ship by the Hansa Line.

Q. Do you know of any instance where competition of that kind lasted long enough to be of any advantage to the trade?

A. The last competition lasted 16 months. Then we brought suit, and after that I think it lasted three months longer. I think it kept up a few months longer, and then they were taken into the conference line—the Houston Line and Prince. That did not indicate to me as a merchant that it was not practical to keep up that competition at the rates for which it was carried on for that period. It indicates to my mind that it was so profitable that the conference line was willing to divide with others.

Q. If that was so, there would be some other competition come right in on top of it?

A. Well, in 1904 business got so bad that everybody engaged in it was sorry they were in it. Trade conditions changed.

After the Hansa came into the conference, Thomsen & Co. kept on doing business from South Africa.

Q. And they kept on doing business in South Africa after Prince came in. Are you in a position from the information that you have before you to state whether Thomsen made more or less money after Hansa came in than he did before Hansa had entered into the competition?

A. I am in a position to answer the question, yes.

I will give you figures. During the first six months of 1901—that is, when we were shipping exclusively by the conference line, the profits were \$4,115.00. I am speaking of 1901, just prior to the

fight of the Hansa Line there, the opposition, during the second half of the year 1901, that is, covering more or less the period when the Hansa Line competed, and our profit ran \$3,756.00. During the first half of 1902, that was while we were still loyal to the reign of the line, our profits were \$3,711. We broke loose in the middle of 1902 and began to ship by opposition, and our profits more than doubled, because during the six months of 1902 our profits were \$6,334 against \$3,711. In 1903 our profits were maintained in the same ratio, the first six months \$6,544—the first six months.

Q. So the double profit was substantially equivalent to cutting the freight right in two?

A. No, it was due to the very much larger volume of business. We executed a great many more orders then. We were in a position to compete with other countries. From October, 1902, until the end of June, 1903, we were free to ship by the conference or the Prince Line. We shipped by whichever offered us the lower rate—the lowest rate.

193 Q. When was it you say you broke away from the conference altogether?

A. We made up our mind, after consulting legal advice—I think it was in August—it was after August 15th, 1902, and our large shipments were made during October, November and December of that year and the succeeding January and February. We have made a claim against Barber & Company for return commissions on shipments made September 30th, 1902. The date of the engagement must be at least 6 weeks prior to that—at least six weeks prior to that.

Q. I think that is the only item on which you make any claim after the date that you have mentioned, isn't it?

A. Well, that must have been old business, probably done in June or July. I have been in the shipping business about 17 years.

Q. During the time in controversy were you aware of a principle of law that a shipper has a right to tender alongside of any common carrier cargo that he desires to have carried on that particular voyage, and to demand that it be carried at a reasonable rate?

A. I was not aware of it, because we never shipped that way. We first had to ask if any steamer had room.

Q. Did you ever, during the time in controversy, deliver any cargo alongside of any conference steamer or upon the wharf of any conference steamer?

A. Without a permit to, no.

Q. With a demand that it be carried at a reasonable rate, or at any other rate than that which you had previously arranged, yes or no?

A. I cannot answer no. I must answer the way I understand the question.

Q. Did you ever do it, is all I want to know now?

A. Deliver cargo to the steamer without a permit, no.

194 Q. I did not ask you if you ever delivered it to the steamer.

I asked you if you ever delivered it alongside of a steamer, or offered it to the wharf, with the demand that the cargo be carried at a reasonable rate?

A. We never delivered any cargo to a steamer or to any wharf, or alongside of a steamer without having a permit, because we did not need to incur the expenditure of carting.

Q. That means, you never did make any such tender as I have spoken of, did you?

A. No, we have not.

Q. Did you ever tender or deliver alongside or at the wharf of any conference line steamers any cargo which the steamer did not actually carry and deliver?

A. On many occasions a lot of our cargo was shut out.

Q. I don't mean shortage. Where it was shut out it was taken by some other?

A. It was taken by some other conference steamer, yes, sir, on many occasions.

Q. So all the cargoes that you ever tendered alongside or at the wharf of a conference line steamer was either taken on the steamer or on the next following steamer?

A. It was taken because we had permits for that—an engagement.

Q. Well, where you had a permit or engagement the permit or engagement was for the carriage of it at a fixed rate, was it?

A. Contracts were always at a fixed rate, yes.

Q. Well, that was the agreed rate which was specified in the engagement or contract, was it not?

A. The rate at which the cargo was engaged.

By Mr. BAYNE:

Q. I will ask the single question, What was the total amount paid by you in freights and in ten per cents to the conference lines from October 25, 1901, when Hansa joined the conference, 195 and during the succeeding period up to June, 1902, during which there was no opposition?

Mr. KIRLIN: I object to that as immaterial and irrelevant. That is a long time, your Honor will observe, after the Hansa line entered the conference—this period that is now being asked of.

Mr. BAYNE: That is the same question your Honor already ruled on.

Mr. KIRLIN: No, the question that was asked before was, how much freight was paid during the time Hansa was on, and now he is asking how much freight was paid during the time that he thinks Hansa ought to have remained on.

Mr. BAYNE: That's it. That's right.

Mr. KIRLIN: From the time after Hansa withdrew from the opposition. I maintain that that is immaterial and irrelevant, and not a matter that ought to be submitted to the jury, because speculative and uncertain, first, as to whether Hansa would have remained in the service on a competing basis, such as followed. Second, if he had remained, the freights would have remained the same; and third, whether that would have remained if they had remained and charged such low rates.

Objection overruled. Exception by defendant.

A. The total amount of the freight paid during the period mentioned by you was \$23,106.39.

Q. During the period I have just referred to, how did the rates which were charged by the conference compare with the rates which had been available during the Hansa competition?

Mr. KIRLIN: I object to that as immaterial and irrelevant. Objection overruled. Exception by defendant.

196 A. The rates charged then by the conference line were about the highest in its history. They were as high, and they were at least 25% higher than rates which were available from the opposition line.

Q. During the period of the competition of the Hansa Line?

A. Yes, sir; from 20 to 25%.

By Mr. KIRLIN:

Q. That is, after October, 1901, and up to June, 1902, you say the rates were the highest in the history of the company?

A. I don't say—I will modify there—not the highest in history, but as high as they were before the fight with the Hansa Line, and I repeat that they were fully 20 to 25% higher than the rates available during the Hansa fight.

I have before me the freight rates, the conference rates for 1901. They were exactly the same throughout the entire year, except the months of June and July. That was the time of the fight. After the fight was over they were not any higher than they had been before the fight began. They were advanced to just the same figure.

Q. And that was 7 shillings 6 pence, less than they had been during the preceding part of the preceding year, wasn't it?

A. Not during the entire year, because the beginning of 1900—

If you say the last four months, yes. Four months preceding that they had been 45 shillings, and four months preceding that they were 40 shillings.

Q. Mr. Sulima, at the preceding trial, when Mr. Thomsen and Mr. Riedel were on the stand, did not you hear the Judge ask them whether their claims for damages were limited to these rebates which were withheld and to some slight officer expenses, extra
197 stenographic force and so on, writing letters in connection with the recovery?

A. I remember such a question.

Mr. BAYNE: I object to that your Honor as irrelevant and immaterial. The complaint shows what the claim is. The testimony adduced here shows what we proved.

Mr. KIRLIN: I suppose it is relevant and material whether three or four large claims are being put forward here by Mr. Sulima, when his principals on the preceding trial distinctly stated, as he now says, that their only claim was in respect to these deferred rebates and expenses.

Mr. ULLO: I beg to correct you Mr. Kirlin because I tried the case before. This is not true and that is not the fact. The records show.

Mr. BAYNE: Before the plaintiff got through finishing his testimony, before they put Mr. Sulima on the stand the Court dismissed the complaint; did not give us a chance to produce the rest of our testimony, dismissed the complaint.

The complaint was dismissed before upon the admission of Mr. Thomsen and Mr. Riedel, that the only thing being claimed in the action was these rebates which were withheld, and some small incidental expenses incurred by Thomsen & Company in writing letters and in trying to collect these rebates. That is the specific ground on which the Court dismissed the complaint in the middle of the action was, non-paying of these deferred rebates which were not recoverable as damages under the Sherman Act, and as no other damages were being sought, there was no reason to proceed any farther in the case, and the record which your Honor has before you, will bear me out in that. Now, I am asking Mr. Sulima if that is not a fact. I will put in the record on that subject.

198 Mr. BAYNE: I object to this case being tried except on the pleadings in which we claim \$15,000, and on the testimony which we offer to prove it. If we don't prove it, then we are not entitled to it. If we do prove it we are.

Objection sustained.

Mr. KIRLIN: I don't want to insist on this, but I would like to have the record clear on the subject. Does your Honor rule that I cannot show that Thomsen and Riedel both stated on the previous trial that the only damages claimed was——

Mr. ULLO: That is not true.

The COURT: In fact, I ruled that you could prove it, but in my view of it, the record does not sustain any such claim, unless you point it out.

Mr. KIRLIN: I will point it out at further length. I was asking Mr. Sulima, who was present, if he heard the testimony, and he said that he did. Objection was made to it, and I don't know just what effect your Honor's ruling has upon the answer that Mr. Sulima made. Does your Honor mean to affect his answer at all by the ruling that was made?

The COURT: Oh, no.

Mr. KIRLIN: Then I will ask another question. Perhaps that will clear it up.

Mr. BAYNE: Perhaps it will abbreviate it to say that if he will ask as to any testimony given at the previous trial, if that was given, if the witness heard it given. Of course, I won't object.

Mr. KIRLIN: Folio 519, Mr. Thomsen on the stand. Mr. Sulima, do you remember hearing Mr. Thomsen testify to this.

"By the COURT: Q. In your complaint you ask to recover the sum of £1,112.7.11? A. Yes.

199 Q. Is that sum made up of commissions or rebates that you claimed from the defendants or some of them and did not get? A. That sum represents the amount of the 10 per cent. commission which we were entitled to in our opinion.

Q. And which you demanded from them and did not get? A. Was not returned.

Q. That is, you had not received it down to the time this action was begun? A. No, sir."

Mr. ULLO: Go on. Go on to the next.

Mr. KIRLIN: Then at Folio 178. Then further—I cannot refer your Honor to it in the book here—in the stenographer's minutes I read, did you hear Mr. Thomsen testify to this, page 163 of the minutes?

The COURT: Did you hear Mr. Thomsen testify to what has already been read to you from the printed record?

The WITNESS: I have heard Mr. Thomsen.

Mr. KIRLIN: Did you hear him testify in answer to this question by the Court?

"The COURT: Will you tell me what portion of your complaint you specify your damages in? Just direct my attention to the portion of the complaint. I had supposed it was set forth in the 17th Section.

"Mr. ULLO: The 26th.

"Q. Have you employed further assistants in your office? A. We did have some extra labor—yes, sir—typewriters."

Mr. ULLO: Won't you kindly read "Mr. Kirlin: I object to that as immaterial."

Mr. KIRLIN: Our objection to that, objection overruled and exception.

200 The COURT: Why, this whole case is clear, if you just read what the attorney for the plaintiff stated right along in there. There was some difference of opinion in regard to it—that is not there. I think there was some difference of opinion about it. One thought one way on the subject-matter of the claim for damages. For instance, the Court said: "Will you tell me what portion of your complaint you have specified your damages in—just direct my attention to the portion of the complaint. I had supposed it was set forth in the 17th Section.

Mr. ULLO: The 26th.

Mr. KIRLIN: Folio 541 of the record: "The Court: And I also understood that everything else that the plaintiff claimed by way of damages consists of expenses or injuries of some kind growing out of the non-payment of these 1,112 Pounds of rebates. Mr. Riedel, who was on the witness stand, acceded to this statement and said it was true." Don't you remember that?

The WITNESS: I have no distinct recollection—not in the way you put it.

Q. You don't dispute the fact that Mr. Riedel made that statement, do you?

A. My impression was that the statement was made differently by Mr. Riedel, because there has always been the claim of our rebate and the \$10,000 damages.

Q. Isn't it a fact that neither Mr. Riedel or Mr. Thomsen mentioned any damages at all in their testimony except these rebates?

A. They were on the witness stand only a few minutes, and never

had time to mention it, and besides that, I was the one to prove that. They were not in touch with the business.

Q. Did not Thomsen give his testimony entirely?

A. Mr. Thomsen was the head of the firm. He knew very little about the South African business. He was put on the witness stand to say that he was the head of the Thomsen Company.

Q. He was put on the stand and examined by Dr. Ullo and cross-examined by me?

A. Yes, he was.

Q. During the whole course of his deposition did he say one word about any one of these three orders you have testified to here to-day, the orders of July 19th and 26th, 1901, and the order of June 10th, 1902?

A. He had no knowledge of it whatsoever.

Q. Did he say one word about it?

A. He was not proving that.

Q. Answer yes or no?

A. He didn't say, no.

Q. He did not?

A. No.

Q. And did he not go into additional details of office expenses, cost of typewriters, and so on, that he claimed had been incurred in connection with trying to recover these deferred rebates?

A. In a very vague way. He went into it very vaguely. He knew very little about it. He also covered the question of rebates in his testimony very incorrectly—very vaguely. Mr. Thomsen was not at all in touch with this part of the business.

The COURT: I think you are spending a great deal of time on a subject that seems to me superfluous.

Mr. KIRLIN: I will leave it.

The COURT: It appears that Judge Hough dismissed the complaint before the plaintiff had rested his case. Take up something else.

Mr. KIRLIN: I have finished, your Honor.

By Mr. BAYNE:

The management of this South African business was entirely in my charge; and all the details of it were matters that I alone would know about.

Q. You were asked your opinion as a person who had shipped for 17 years, from the knowledge gained as a shipper for 17 years, as to whether certain rates were compensatory or not, and I understood you to testify that, in response to those questions, that a rate of 15 shillings would, in your opinion, just about cover the cost. Were you giving that testimony relative to the period covered by the complaint?

A. Yes, to the period covered by the complaint. And I may add, if I may be permitted, that I should make the figure from 15 to 20 shillings. That opinion was based from a general knowledge of the

trade and the several opinions expressed by the various steamship people on the Produce Exchange. It is my opinion that during the periods covered by the complaint a charge of in excess of 20 shillings per ton would be more than compensatory.

Our application for rebates was in each instance from nine to fifteen months after the time when the 10% had been taken.

Q. You were asked about your sales and some questions were asked you about the way in which you made up your mind what you would charge. Didn't you sometimes make sales at a loss?

A. We had to occasionally make sales at a loss.

Q. In order to compete with the business?

A. In order to show our customers that we were in business, yes.

Q. You were asked your opinion relative to the advantage to shippers of regularity of rates, and regularity, partial regularity of shipments. And, assuming that that question was intended to refer to such regularity of rates and regularity of shipments as existed during the period covered by this complaint, what is your opinion, that it was advantageous or disadvantageous?

A. My opinion is that regularity of sails is very necessary, 203 but we never had it. The conference never gave us regularity of sails. As to the rates charged during that period, they were not advantageous to me as a shipper. I testified that the competing rates were, those that were offered. And when we had the opportunity to deal on the competing rates and took advantage of it our profits nearly doubled. In doing our business on the Exchange it was sometimes our method, being in touch with our customers, when we found that there was a market price for wheat, insurance and a rate of freight which would enable us to make a profit by offering them low rates, to communicate those to customers. That was the practice. We did find that the rates that existed and were charged by the conference steamers had the result of preventing us from competing with the Argentine Republic on many occasions. Had the rates been 20 shillings or 25 shillings per ton during the period when there was a monopoly we would have been able to have done a very much larger business in grain—in cereals. In other words, the rates which were charged by the conference prohibited me from competing with other grain producing countries.

The first shipments we made by the conference lines in 1899 were made before we had seen the circular, and were made on verbal representations as to what would be done if we did not compete with competitors. That information was given to me personally. I did have occasion during the times mentioned in the complaint to request to ship on other terms than the terms which the conference offered. I made repeated requests. I always made objections to the rates they were charging, and very frequently to their charges of 10% additional. I have written a great many letters on the subject.

Verbal communications also daily.

204 Q. You were asked as to whether certain consignees were not interested in your shipping by the conference lines. Were those consignees who were in the same fix as yourself relative to the 10%?

A. Precisely. And they were interested to protect their 10% in the same way we were, made on shipments by other parties.

By the COURT:

Made on shipments by other parties, not by ourselves. We made some shipments and they would go through other parties as well.

By MR. BAYNE:

The Hansa vessels, other than the four which were engaged in the trade here, were large and fast vessels. I should say it would take one of them to go from Europe from 11 to 13 days. Our engagements were made sometimes two, four and five months ahead. It might have been within four weeks, or I suppose six weeks, occasionally. I was asked something about the Prince Line being in a position to fulfil its contract. It did fulfil its contract with us to carry grain at 20 shillings a ton for the period of six months. And for a period of twelve months, at 25 shillings.

Q. What was the period when you said the Prince carried for 25 shillings; what twelve months was that?

A. The contract was for the first six months at 20 shillings and the succeeding six months 25. That is, the average rate for the twelve months would be 22 shillings 6 pence. The last six months would come from May, 1903, to the following October. The first six months would be from October till March. I have the conference line rate before me for that period.

205 Q. They were 23 shillings 9 pence and 10 per cent, were they not?

A. In November, yes.

Q. Wait a minute.

A. Which months are you looking at?

Q. I am looking at these months which you mentioned, May, June, July, August, September and October; 23 shillings 9 pence down to October?

A. 25 shillings 9 pence was in May, 1903.

Q. Also June and July?

A. June and July.

Q. August?

A. August.

Q. September?

A. September. I had 22 shillings, 6.

Q. September 22 shillings 6?

A. Yes.

Q. October was 22 shillings, 6?

A. Yes.

Q. And November was 23 shillings, 9.

A. We did not have any contract then.

Q. The conference line rates were better than the Prince Line rates or as good at that time?

A. No. The average rate for the twelve months was 22 shillings, 6 pence, net.

Q. I am asking about these six months?

A. You don't take into consideration the 10 per cent so-called primage.

By the COURT:

Q. Did I understand you to say that the increase in the price of the commodity should be taken into consideration in the rate of freight and so-called primage?

A. In fixing our price in the C. I. F. sales we had to take into consideration our cost of the delivery of the goods in South African ports at a net price including the lowest freight we could obtain.

Q. You don't mean to say you charged more because of the fact that the steamship was retaining your primage?

A. We could not do that.

206 Q. I misunderstand you in that respect. I understood counsel to call your attention to Mr. Thomsen's testimony on the former trial, that the 10 per cent was taken into consideration in fixing the price.

Mr. KIRLIN: He did so testify.

By Mr. BAYNE:

Q. You are the one, however, who fixed that price?

A. I was in entire charge, and as I said before, Mr. Thomsen knew very little about the details of this business, and I had reference to the 10 per cent on the so-called indent business which I have explained to you and which is no part of his suit.

[Plaintiff- rests.]

Mr. THACHER: If the Court please, we desire to make several motions. It will be better to state them all and then proceed with the argument.

1. In behalf of all the defendants, we move that the complaint be dismissed on the grounds,

(1) That the proofs do not establish any cause of action stated in the complaint.

(2) That the proofs do not establish any cause of action alleged in the complaint based upon the combination or conspiracy by the defendants other than the Hansa Company.

(3) That the proofs do not establish any cause of action alleged in the complaint based upon a combination or conspiracy by the defendants originally named, including the Hansa Company.

2. In behalf of the defendants composing the firm of
207 Norton & Son, we move to dismiss on the ground that the proofs do not establish any cause of action stated in the complaint as against them.

3. In behalf of the defendants composing the firm of Barber & Co., we move to dismiss on the ground that the proofs do not establish any cause of action stated in the complaint as against them.

4. In behalf of the defendant, Bucknall Steamship Lines, Limited, we move to dismiss the complaint on the ground that the proofs

do not establish any cause of action stated in the complaint as against this corporation.

5. In behalf of the defendant, Union Castle Mail Steamship Company, Limited, we move to dismiss the complaint on the ground that the proofs do not establish any cause of action stated in the complaint as against this corporation.

6. In behalf of the defendants named as composing the firm of Donald, Currie & Co., we move to dismiss the complaint on the ground that the proofs do not establish any cause of action stated in the complaint as against these defendants.

Argument by Mr. Thacher.

The COURT: My view of it was when I ruled on the motion to be permitted to amend the complaint, that the theory was that the combination had already been formed and Hansa simply became a co-conspirator in something that already existed.

Mr. THACHER: Our contention is this, in this respect, that if you refuse to agree with me that there is nowhere any proof to establish the existence of any combination or conspiracy made illegal under this Act, then you must dismiss this complaint, because there can be no dispute whatever on the proof that all the defendants
208 here are not chargeable with any such combination or conspiracy as is alleged or as fits the proofs.

The COURT: It is stated in the complaint that the Bucknall Steamship Company and the Union Castle Company joined the conspiracy subsequently.

Mr. THACHER: No, the allegations as to them are, as to all the others, except when they brought in the Hansa, that prior to 1898 these defendants made an agreement. There is not any allegation afterwards that they came in as conspirators; it is all tied to that one agreement in the 11th section.

The COURT: Do you mean to say that the decisions go so far that if I concluded to hold that these two defendants whom you have just mentioned are not properly in the case, that the complaint would have to be dismissed as to all of them?

Mr. THACHER: I mean that exactly.

The COURT: My supposition has always been that where there is a joint tortfeasor you can sue one.

Mr. THACHER: You can sue; that is all right. You can sue a joint tortfeasor, but not sue at the same time the others; but the tort, whomever you sue, where you are suing jointly, has got to be one to which all the parties you sue are parties. It is a joint charge. It cannot be anything else. That case from which I read is a case which arose under this same section of this same statute so that it is peculiarly applicable to this case.

The COURT: It is, as joint tortfeasor, not separable.

Mr. THACHER: Not separable

The COURT: Why not? There are still two more alleged conspirators here.

Mr. THACHER: But that is not what they have charged. They cannot come in and say that A, B and C, and so on, entered into a conspiracy and maintain their case by proving a conspiracy between two of them. This Court does not allow that sort of thing. They cannot play fast and loose. If they charge two they must prove against two. If they charge six they cannot make their case by proving against two; and their case goes to the wind for that reason and without more.

Adjourned to Thursday, April 22, 1909, at 11 A. M.

NEW YORK, April 22, 1909.

Mr. BAYNE: If your Honor please, with the consent of the counsel for the defendants, the case of the plaintiff will be reopened for the purpose of introducing testimony adduced at the former trial, which we have agreed upon to be introduced, and one or two questions of Mr. Barber on the same subject. I now read the testimony referred to.

Mr. THACHER: We have not agreed that it be put in. We have objections as to the materiality. You may read it subject to our making objections. We consent that the testimony he desires to read shall be read, and we shall object afterwards.

The COURT: As to the competency and materiality of the testimony?

Mr. THACHER: As to the materiality, but we can make our objections after it is read.

Mr. BAYNE: Mr. Norton, Edward N. Norton, who has been a witness on the stand, page 154:

"In 1890 there were 50 boats dispatched between me and the others. 30 of mine, and Messrs. Arkell & Douglass also had an opposition line to mine; there were 20 boats besides the 30 I dispatched. That would make about 40,000 tons of cargo in 1890."

210 Mr. BAYNE: At page 154 of the record, folio 462:

"By Mr. KIRLIN:

"Q. When did the steam service begin? A. In 1892 I concluded that the time was ripe for the regular steam service between this country direct to South Africa, for the reason there was a great deal of high class cargo that was going via England to the South African ports, mining machinery and cargo of that nature, and I thought we could catch that direct from New York and greatly develop the American trade by giving a direct steam service between the United States and South Africa. So I went into the market and was very nearly chartering a steamer to berth her when I had a call from a representative of the Castle Mail Company and Messrs. Bucknall Brothers, of London, who wanted me—who made a proposition to furnish the same tonnage and make me the agents and give a regular service—direct steamer service between the United States and South African ports. After negotiating I agreed to that proposition, knowing it was too big a nut for one man to crack—that they

were very large steamship owners, had a great deal of tonnage, and it required some such steamship men as them to develop the trade and insure to shippers a regular service to the South African ports.

"Q. Was a regular service necessary or demanded by the shippers? A. The regular service developed with the steamers put on the berth. We berthed in 1893 the first steamer—I loaded her—she was the steamer City of Worcester, the first steamer dispatched to South Africa loaded by me under the American and African
211 Steamship Line was the steamship City of Worcester, 1,553 net tons register. She sailed with a full cargo on May 23, 1893.

"Q. That vessel sailed under the auspices of the American and African Line? A. I named the line; it was my name and we adopted it."

Mr. THACHER: We, if your Honor please, think there is not very much in that testimony. It relates to matters away back in 1890. As we read the complaint, the combination of conspiracy, if any, which is alleged is one which was formed and dated by agreement in 1898, as stated in the 11th article of the complaint. There is not very much here so far to show the purpose for which this is introduced, and I may surmise, perhaps, that my friend wants to get away from the argument, that if there was a combination or conspiracy in 1898 it was not one which ended or suspended competition previously existing, because there was no such competition previously existing between the parties. For that reason we object as a matter antedating by several years the time when it is alleged in the complaint the combination and conspiracy on which the action is based was formed or created. And again we object, because it does not relate to the business of at least two of the parties charged with having made up this combination in 1898.

Mr. BAYNE: You mean Bucknall?

Mr. THACHER: Bucknall Steamship Line, Limited, which did not come into existence until 1900, and the Union Castle, by whatever name it is sued here, which did not come into existence by that time. It relates to two parties, Bucknall Brothers and the Castle Mail Company, which are not parties to this action, and are not charged in the complaint with any conspiracy. I don't see how this
212 is competent within the allegations of the complaint. For, as I say, the question itself, as it is put in here, is not of any particular moment to us. It is only to make the objection at the earliest point where the purpose, which perhaps I am wrong in surmising, begins to show itself—that's all. So I object.

The COURT: Does not the question bear somewhat upon the question of whether there was not competition between the lines prior to the alleged formation of the so-called conspiracy.

Mr. THACHER: It will appear by the evidence already that for five or six years prior to the allegation of conspiracy there was no combination. That is, it appears by the evidence already in the case that these lines they are talking about worked in harmony, at least from 1893 down. Now, there are five years or thereabouts be-

fore it is alleged that we formed the combination upon which this suit is based and brought.

Mr. BAYNE: My opponent in his argument yesterday said that there was no competition which was restrained—no competition pre-existing which was restrained. I discovered that by inadvertence. I omitted to put this trial testimony which was adduced at the previous trial, and by consent of Mr. Kirlin I was permitted to reopen to introduce any testimony that might be relevant and material. It is for the purpose of showing that there was competition between four of the defendants in this action, and that that competition was restrained and ceased by the combination which we charge was formed.

The COURT: From 1890 up to the formation of this conspiracy—

Mr. BAYNE: The exact facts that we hope to prove, expect to do are that during two or three months in the year 1892, Cayser, Irvine & Co. and Barber & Co., represented by Cayser, Irvine
213 and Donald Currie & Co., respectively, represented by Norton & Son and Barber & Co., were engaged in the South African trade in competition one against the other. That thereupon they made a gentleman's agreement which thereafter crystallized into an understanding and combination that we are suing on here.

Mr. THACHER: There is no allegation about it.

Mr. BAYNE: There is an allegation that some time prior—and this is the time prior to 1898, such a combination was formed, and this is for the purpose of showing that my opponent made some point in argument about it, but I don't think it was very important, but I had overlooked the testimony, and here it is, and I want to offer it.

HERBERT BARBER, recalled.

Examination by Mr. BAYNE:

In the year 1892 Barber & Company did represent Cayser, Irvine & Company, and Norton & Son did represent Sir Donald Currie & Company. I think you are a year ahead of time. I think it was 1893 instead of 1892.

Q. Would you make your answer, then, 1893 instead of 1892?

A. One of those. It was the year ships started to South Africa.

Q. Now for three or four months during that period, did not the ships represented by your firm and operated by Cayser, Irvine & Company in the South African trade compete with ships in the same trade operated by Donald Currie & Company and represented by Norton & Son?

A. We had no ships that were operated by Cayser, Irvine & Company. Our ships that we had then were controlled by Cayser, Irvine & Company and the Union Mail Steamship Company.

214 Mr. THACHER: I suppose it is unnecessary to say that an objection runs to all of this?

The COURT: Yes, you have an objection and exception.

The WITNESS: We engaged those jointly. The ships that were engaged in the South African trade under our agency were ships managed jointly by Cayser, Irvine & Company and the Union Mail Steamship Company.

Q. Now, during the year 1893, for three or four months, did not the ships represented by your firm as you have just testified, and the ships represented by Norton & Son as you have testified, compete in the South African trade?

A. We did more or less for months. I think Mr. Norton dispatched two and we dispatched one.

Q. Did you not testify on the previous trial "The first month I think two steamers were dispatched by each line in opposition"?

A. No, that was contrary to the fact. If I did, that is a mistake. We did dispatch at least one vessel in competition with one another. At that time the ships Norton & Son represented were operated under the name of The American and African Lines. After this competition there was no combination. We worked harmoniously together. We did not let our sailings clash one with the other, and we tried to arrange rates.

Q. You agreed to ship on uniform rates. Is not that the fact?

A. Not uniform. We tried the best we could to fix it. The first two steamers operated at a loss, you see, and in this competition the ships lost money.

We ceased competing and operated in harmony.

215 Cross-examination by Mr. KIRLIN:

The Donald Currie & Company that I said Norton was agent for at that time was not the same firm of Donald Currie & Company that is used here, not the same partners. At that time Sir Francis Evans and the other Evans were not in the firm. Francis Evans was the managing director of the Union Mail Steamship Company for which I was then in 1893 the agent. That is the gentleman who subsequently went into the firm of Donald Currie & Company that is sued here came into the trade in March, 1900.

Q. March, 1900. Was that the time you were asked when you were on the stand the other day to give the date when the Union Mail Steamship Company and the Castle Mail Steamship Company which were in existence in 1892 or in 1893 were amalgamated under the name of the Union Castle Steamship Company, which is the defendant in this suit, came into the trade. Did you get that date?

A. I have got the date, yes.

Q. When was that?

A. March, 1900. Neither that company nor the reorganized firm of Donald Currie & Company took any part in the conference prior to the date I have just given.

Redirect examination by Mr. BAYNE:

Except for Sir Francis Evans and the other Evans, the firm was the same, was it not?

A. Same style.

Q. Well, the same members, wasn't it?

A. I could not say. I don't know.

I don't know that it was not. Sir Francis Evans held a relation as manager of some company that I represented in that trade back in 1893, and during those two or three months you refer to in 1893.

216 Q. And the other Evans also?

A. I don't know. I don't think he did. I don't know about that.

Mr. THACHER: Is that all, Mr. Bayne?

The WITNESS: These vessels that were engaged in the conference of the separate lines were not managed in partnership during the conference arrangement. They were each managed separately, except in so far as they agreed relative to the conference.

Mr. THACHER: Shall I proceed with the motion?

The COURT: Yes.

Mr. THACHER: Your Honor will observe from the evidence that is now brought out from Mr. Barber that there are only these parties—the firm of Cayser, Irvine & Co. and the firm of Barber & Co., an agent merely, and the firm of Norton & Son, who were in existence at the time in 1893, when they say there was competition, when a conspiracy is alleged, I mean—whether you take it as alleged in 1893 or any time after that until 1898. Those are the only ones that were in existence—the only ones who are sued who were in existence at that time.

The COURT: I don't think there is any doubt of the reasonableness or the unreasonableness of the rate, in the action. It would depend upon the reasonableness or unreasonableness of the rates.

The COURT: The point I was referring to was whether it is not the duty of the Court to submit to the jury the question as to whether this was a part of the legitimate rate, or whether it was not a commission which should have been repaid by reason of the fact that there was an unlawful conspiracy.

Mr. THACHER: I do not see any ground for that. What you have in regard to that branch of the case is this: These defendants, severally, in these contracts that were voluntarily made by
217 these plaintiffs, did business on the basis of charging a certain freight. That freight consisted of two parts; what is called the net price, plus the ten per cent primage; and when they did business on that basis, and they did it on no other, and the plaintiffs never demanded that they should do it on any other, they agreed that if he complied with certain conditions he should get back ten per cent. Now, was that arrangement as a whole in effect charging a rate which was distinctly unreasonable?

The COURT: I don't know.

Mr. THACHER: That is the question. * * *

The COURT: Do I understand you to say with respect to this, that the plaintiff, as matter of law, cannot recover because he voluntarily paid it, or because the primage was part of the rate which was legitimate and which was reasonable?

Mr. THACHER: I claim both.

The COURT: You do not want me to hold that as matter of law on this evidence?

Mr. THACHER: I do.

The COURT: Assuming that there was an unreasonable combination, under the wording of the Circuit Court of Appeals, do you think I ought, on such evidence, as matter of law, that the rate was reasonable, and that this transaction was a reasonable one?

Mr. THACHER: No, you are not required to do that. First, your Honor should hold that there can be no injury which can be the basis of recovery in this action which was based upon and grew out of, as all these claims of losses are, the voluntary making of these contracts by the plaintiffs with these defendants. That is the first one. Now, the second. If there is any theory upon which, notwithstanding that, you can hold the defendants on the theory
218 that they made the plaintiffs pay for the service they got more than they had any right to, then I say, if it be true, that they were only entitled to charge for that service a reasonable rate, although I confess myself I do not know what the basis is upon which to rest it. But assume that it would be your Honor's duty not to permit the jury to speculate about it, as to the question of whether these rates that were charged were reasonable or not. That the case is destructive, as presented by the plaintiffs, in several things that are necessary to enable intelligent men to determine whether the rates were reasonable or not. * * *

The COURT: What do you say to the question that it does not appear from the evidence that there was a combination prior to 1898; the testimony which you brought out this morning that it was in 1893, and that there was a continuation of competition.

Mr. BAYNE: I say this, your Honor, that it is absolutely unnecessary to show that there was no competition prior to the formation of this combination, for the reason that it is alleged that the combination was formed to prevent competition from coming in, and the scheme consisted in exacting unreasonable rates from the shippers, and thereby exclude competition from coming. As Mr. Norton has testified very frankly, he says the object of the conference was to keep everybody out. Now, that is what is charged as the combination from which we suffer our injury. The injury did not result from the fact that the members of the conference did not compete among themselves. That I have not attempted to claim.

The COURT: The Circuit Court of Appeals, in the Tobacco case, used some language from which it might be inferred that the term competition, under this act, that it must appear that prior to
219 the combination there was competition business. Now, it occurs to me, whether it can be inferred that the business would have been competing once had the combination not been entered into.

Mr. BAYNE: I take it that may be inferred.

The COURT: Does it appear that those other boats, that sailed from the port of New York prior to December, 1898—

Mr. BAYNE: It is shown that Cayser, Irvine & Company, represented by Norton, boats represented by Barber, and that a firm under the name of Donald Currie & Company, some of whom were members of the firm that is sued here—the members, the members of whom were sued here, were engaged in competition with one another for two or three months, and then that they entered into this arrangement and stopped that competition.

The COURT: When?

Mr. BAYNE: In 1893. But I want your Honor distinctly to understand that the cause of action that we allege here in the main is not the injury resulting from the fact that they did not compete with one another, but the fact that they formed the illegal scheme, for a monopoly, of exacting more than reasonable rates which they held as forfeit money, and that they thereby restrained our trade with competition lines that came in after. That was the combination from which we suffered our injury. * * * I say that this is an action on a tort. They are jointly and severally liable. It cannot be denied and will not be denied that you can choose whom you will sue.

The COURT: That is the ordinary rule.

Mr. BAYNE: This is a combination—not only a conspiracy but a combination. That is the ordinary rule, and that is the rule relative to a conspiracy, and the authorities are common on that subject.

220 First, I want to discuss it on reason. We allege a tort.

The tort consists of combining—which means concerted action in a certain direction.

The COURT: I don't think you need take up any time on that point.

Mr. BAYNE: I don't think so. The case he cited was one in which there were two separate very distinct kind of cases, upon which were illegal——

The COURT: You need not take any time on that. In the case wherein this question was discussed it was held generally that actions in tort are joint and several. It is true enough, that this was an action for false imprisonment.

Mr. KIRLIN: I am reading the Court of Appeals opinion in this very case; * * *

Now this is what the Court said the complaint alleged—a cause of action in which all the defendants united, and that is all the complaint does allege.

The COURT: Do you think the Court was using that language, that if the plaintiff failed as to one or two defendants that the action would have to be dismissed?

Mr. KIRLIN: Yes, your Honor.

The COURT: And that the conspiracy must be proved as against all.

Mr. KIRLIN: Yes, sir; I certainly do think that that is exactly what they meant. The concluding language shows it. And this is exactly what the Court of Appeals held in the Philadelphia case, of *Loder vs. Jayne*——

The COURT: In that case the decision went off, because the complaint was not dismissed as against those who were not in the conspiracy.

Mr. KIRLIN: Oh, I think your Honor is not correct about that, unless we misread the case. That is one of the reasons. It
221 was dismissed because it was not proven against them all.

* * *

Now I submit with deference, as your Honor seems to have a contrary view, that a case charging conspiracy jointly among a number of persons which is based upon an allegation that all the persons charged entered into the conspiracy, contract or agreement or combination—it does not make any difference which one of the three it is, because it is a crime equally, whether it is one or the other,—presents for consideration a different case from that which would be presented if it had been alleged that A and B conspired with others. It is a different case from that which would be presented if it had been charged as it is charged in this action.

The COURT: In other words, a joint tort having been alleged a joint tort must be proven?

Mr. KIRLIN: Yes, sir; the same as in an indictment.

The COURT: There is no evidence here of a joint tort.

Mr. KIRLIN: No evidence here of a joint tort. * * * Now I submit that when a man has two alternatives such as these—one to save himself from any oppressive charge or any oppressive combination, and another, to take his rate, make his contracts, carry out the general scheme without any objection or protest, and he voluntarily elects to adopt the second course—he is in no position to say that he has been legally coerced. He has not done anything except what he wished to do; that which he preferred to do. He has not sacrificed anything, because he need not have done it, if his theory now is right, that the rate was wrong.

The COURT: What would be the effect of it where Mr. Sulima, as he testifies that he did the other day, insisted from day
222 to day that the exaction was improper and unlawful?

Mr. KIRLIN: He said that on the exchange, when he was quoted rates, he objected. He did not state they were unlawful. He stated that he ought to get lower rates, because the opposition was lower. That was all a part of the bargaining while they were dealing with the rate. * * * I submit, that your Honor ought to dispose of the case at this time, by dismissing the complaint.

Mr. BAYNE: Does your Honor wish to hear from me farther?

The COURT: You can submit a brief on the subject where the Court held in a conspiracy case that one or more of the defendants may be omitted.

Mr. BAYNE: Yes, sir. * * *

The COURT: I have the other case [Loder v. Jayne] in mind. I understood you to say this morning that that case did not apply because the inferior court did not separate the guilty from the guiltless.

Mr. BAYNE: That is so.

The COURT: I think I have heard you sufficiently. I think I

have given you the time generously, although I recognize that this is a very important case. There have not been many cases brought under the Sherman Act, and of course I welcome all the argument that the importance of the question demands; but I think that this case must go to the jury. The uncontradicted evidence to my mind, shows an unlawful combination and restraint of trade. In that respect, at least, I will have to accept the decision of the Circuit Court of Appeals. The questions of fact to be submitted to the jury are, first, whether this rate charged and accepted as alleged in the complaint was excessive and unreasonable or whether it was reasonable and just. Secondly, was the plaintiff coerced into paying an excessive rate? Third, all the questions that arise are whether the plaintiff sustained injury to his business, namely, the damages under the theory regarding which we have been carrying on the discussion. The motion of the defendants is denied, excepting that the defendants, the Union Castle Mail Steamship Company and the Bucknall Steamship Company, Limited, the corporations which appear in the evidence to have been organized subsequent to the alleged conspiracy, must be dropped from the case. In respect to those defendants the complaint is dismissed.

MR. KIRLIN: Does your Honor intend to deal especially with the case of the agents?

THE COURT: I have allowed counsel for the plaintiff to persuade me that my original views in regard to that are wrong. He has called my attention to the fact that these agents, being in the conference, represented foreign steamship lines, that they made reports to the principals in London as to their actions, and there is some testimony tending to show that they recommended what the arrangements should be from time to time. At any rate, there is evidence to show that they profited by the exaction.

MR. KIRLIN: May I also suggest to your Honor that the facts which have been developed now about the date of the incorporation of Bicknall and the Union Castle Mail Steamship Company and of the condition of the firm of Donald Currie & Co., which, it has appeared here, was not before the Court of Appeals—I do not think your Honor would be constrained upon the facts which are here now shown in regard to those parties by the decision of the Court of Appeals, though your Honor might take the same view.

THE COURT: I stated that I felt constrained by the decision of the Court of Appeals to hold that there was an unlawful combination. The evidence is all here and I think that is sufficient to warrant instructing the jury as a matter of law on that point.

Exception by defendant.

MR. BAYNE: Before your Honor rules relative to some of the members of the Donald Currie Company, I am anxious not to have any error in this case, and I desire to state that my best recollection is that at the top of page 14 of the minutes the word "is" was actually "was." If that is not corrected, I desire at any rate to have the fact fixed so that there will not be any mistake about this, as to what members of the firm of Donald Currie & Co. were members of the

firm during the period complained of. I don't want to make any mistake about that. I don't want to get caught on any technicality.

The COURT: Perhaps I had better dismiss the complaint as to Donald Currie & Co.

Mr. BAYNE: No, I don't want to dismiss as to them. I want to get the actual fact.

Mr. KIRLIN: The witness said "is." The complaint specifically raised that question, that these gentlemen were partners at the time they were sued, but were not partners previously.

Mr. BAYNE: On the previous trial there was no dispute about that.

Mr. KIRLIN: There was no proof about it.

Mr. BAYNE: There was proof, and I feel in justice that I ought to be permitted to fix that, for my recollection is that the question was asked in the form that does not appear in the minutes. I have to depend on my recollection. That question, according to my

notes—I wrote my questions out in advance—was "was."
225 This is the question which I intended to ask and which I did ask. If the word "was" is substituted for "is"—

The COURT: Recall the witness.

HERBERT BARBER, recalled on behalf of the plaintiff:

By Mr. BAYNE:

Q. During the period referred to in this complaint—

Mr. KIRLIN: Give the years.

Q. (Continued)—namely, from January 1, 1899, to June, 1903, were the members of the firm of Donald Currie & Co., whom you represented the same as those that are now in the complaint?

A. I did not represent Donald Currie & Co.

Mr. BAYNE: Oh, it was Mr. Norton. If you will leave the stand.
Is Mr. Norton here?

Mr. KIRLIN: No.

Mr. BAYNE: Won't you help me out (to Mr. Kirlin)?

Mr. KIRLIN: I would tell you cheerfully if I knew. I would rather you would ask Mr. Norton.

Mr. BAYNE: I must insist on the minutes, my recollection is my question was "was," following the previous question, and not "is."

Mr. THACHER: It does not make very much difference what question Mr. Bayne thinks he put, as the question really is, what did the witness understand that he put. There is the stenographer sitting there and he got it "is," and it is to be presumed that Mr. Norton got it the same way. I don't know any way in which the Court can change the record under those circumstances.

The COURT: I understand if the term was "was" instead
226 of "is," then you concede that this firm should be dropped from the record?

Mr. BAYNE: No.

The COURT: Is there any other testimony in the record about that?

Mr. KIRLIN: Yes, Mr. Barber testified to-day about that, that the firm of Donald Currie & Co., as at present constituted, was formed at the time of the amalgamation of the corporations in March, 1900. The firms formed in 1900 were not sued here. We admit they were partners at the time they were sued, but we deny they were partners during all the time averred in the complaint.

Mr. BAYNE: I think it is very hard. I have testimony given at the previous trial covering that. My recollection is that the testimony at that trial——

Mr. KIRLIN: We will bring Mr. Norton back. You can ask him about that.

Mr. BAYNE: I don't see why we cannot go ahead and reserve the motion as to Currie & Co.

The COURT: Yes, we can go ahead. I have not directed the complaint to be dismissed as to Donald Currie & Co. Those that I have mentioned were Bucknall Steamship Company and the the Union Castle Mail Steamship Company.

Mr. KIRLIN: Donald Currie & Co. stand on exactly the same footing as the Castle Mail Steamship Company, because they were formed on the same date.

The COURT: I do not recall on behalf of what defendants the motion was made.

The CLERK (Mr. Anderson): First, on the part of all; Second, on the part of Norton & Son; Third, on the part of Barber & Co.; Fourth, on the part of Bucknall & Co.; Fifth, on the part of the Union Castle, and Sixth, on the part of Donald Currie & Co.

227 The COURT: I have already dismissed the complaint as against the Bucknall Steamship Company, and the Union Castle Steamship Company, because the evidence shows that these companies were organized subsequent to the date when the alleged combination was formed. I have made no ruling regarding any other defendant, except to say that as regards the defendants Norton & Son and Barber & Co., the motion of the defendants to dismiss the complaint is denied.

Mr. BAYNE: Also as to the individuals composing Cayser & Co.

The COURT: The motion by the defendants to dismiss as to Donald Currie & Co. is held until to-morrow.

NEW YORK, April 25, 1909.

Mr. BAYNE: Mr. Norton tells me that he cannot tell me who the members of the firm of Donald Currie & Co. were at any time except Sir Donald Currie, and therefore I will not go through the idle ceremony of putting him on the witness stand.

The COURT: If I understand you correctly, you practically concede that there is sufficient evidence here to hold Donald Currie & Co. as defendant?

Mr. BAYNE: There is this exception. If Sir Francis Evans, a member of that firm—it is not sued as a firm, you understand; the individuals are sued—the allegation of their being in a firm is simply for the purpose of showing what they did.

The COURT: Who are the individuals then that you concede—

Mr. BAYNE: I don't concede anything, but I do say that there is plain evidence that Sir Francis Evans was a member of the
228 firm of Donald Currie & Co. as now constituted, from 1900 on, and that prior to that time, according to the testimony yesterday, he was engaged in the conference with the previous firm of Donald Currie & Co., so that he individually would be held.

Mr. KIRLIN: Sir Francis Evans is dead, your Honor.

Mr. BAYNE: I don't know whether he is or not.

Mr. KIRLIN: We have the same knowledge about that that we had about Sir Donald Currie.

Mr. BAYNE: I have not any knowledge about it.

Mr. KIRLIN: That is the fact; there is no use going through the futile ceremony—

The COURT: Have you a witness here by whom you can show that he is deceased?

Mr. KIRLIN: Yes.

Mr. BAYNE: If he knows.

Mr. KIRLIN: Oh, yes.

The COURT: The result is that Norton & Son will be eliminated from the case?

Mr. BAYNE: Oh, no. You can choose to sue any one of the conspirators.

The COURT: You may show during the course of the defence that Sir Francis Evans is dead, and then I will make a disposition as to the firm of Donald Currie & Co., and Norton & Son, at the conclusion of the defendants' case.

Mr. KIRLIN: Very well.

Mr. BAYNE: But your Honor is under a very grave misapprehension if you suppose that because Norton & Son was agent of the new firm of Donald Currie & Co. and was only agent of that firm during a portion of the time, but is engaged as the agent of other people who were in the conference at the previous time, that Norton & Son can escape.

229 Mr. KIRLIN: If the Court please, I read in evidence the deposition of William E. Halm, taken by agreement yesterday. Gentlemen, Mr. Halm being bound for Cuba, it was agreed that we should take his deposition out of court, and we did so yesterday morning. It is very short and I will read it to you.

Plaintiff's counsel reads the deposition of William E. Halm.

WILLIAM E. HALM, called on behalf of defendants, being duly sworn, testifies:

Direct examination by Mr. KIRLIN:

I am sailing for Cuba at 12 o'clock to-day. During 1902 and 1903 in New York I was chief clerk for Daniel Ripley, who was agent for R. P. Houston & Co. As chief clerk for Ripley I had charge of the South African service of the Houstons at that time. I had in my possession at that time the charter parties of the steamers that were operated by Houston in that service.

Q. Do you know what the rates were that Houston paid for the ships that were operating in the service at that time?

Mr. BAYNE: I reserve objection as to relevancy and materiality.

A. In most of the time.

During that period Houston conducted the South African business for the most part with chartered ships except the first two. Principally lump sum form of charter. The ship would be engaged for a fixed amount, a lump sum; and the steamer or the shipowner paid all expenses of loading and discharging. I mean that we engaged the ships for a lump sum to make a voyage, they paying all the expenses, we providing the cargo. We provided the cargoes on those ships.

Q. About what were you charging for freights? Take as a characteristic illustration dead-weight grain. What were your rates?

A. For the period of 1902 and 1903?

Our first sailing was August 7, 1902.

Q. What were your rates from that time on?

A. You are referring to grain and flour?

Q. Yes.

A. Dead weight? It ran from 10 shillings to about 22 shillings 6 pence.

I am not sure that I have all of the charter parties. When Daniel Ripley severed his connection with Houston he carried with him all of the correspondence and many of the records. I think, though, that I have.

Q. Give me such records as you have of lump sum charters made by you for steamers between October, 1902, and June or up to September, 1903?

Mr. BAYNE: Hadn't you better confine it to June, the date of the suit?

Mr. KIRLIN: Yes.

The first lump-sum charter was the Heathglen, October 29, 1902. Her price on the dead weight per ton was about 22 shillings 7½ pence. That means that what we were paying for the use of that ship in this trade was 22 shillings 7½ pence for every ton of cargo that the ship carried. The next lump-sum charter which we had was the Heathglen, December 2, 1902. We paid for her per dead-weight ton about 20 shillings. Always dead weight I am speaking of.

Mr. BAYNE: Does the dead weight and cargo weight correspond absolutely?

WITNESS: It does for grain, flour and dead-weight cargo of that sort.

231 Mr. BAYNE: But not on other cargoes?

WITNESS: No, not on measurement cargoes.

The next was the Heathburn, but I do not find the record of it. Being a sister ship, probably the same rate. She sailed a month later. The next was the Clematis, January 28, 1903. Her rate is about 24 shillings 8 pence. I am always speaking of dead-weight

ton. The next is the Ferndene, February 7, 1903. Hers was about 23 shillings 1 pence. The next is the Croyden, March 18, 1903. I have not her cost in the records that are left me.

Mr. BAYNE: You have not got her cost?

WITNESS: No. You will have to guess that by the rate prevailing on either side. The rate is about current. The next is the St. Quenton, April 17, 1903. She cost 23 shillings. The next is the Roseley, April 30, 1903; 6,000 tons, allowing 8,900 pounds. That was one port of discharge, and I don't know how many ports she went to. I will have to see how many ports of discharge she went to. (Witness looks at papers.) My record is incomplete in regard to her. Will that be enough of those, then?

I fixed the freight rates on the steamers and saw to the collection of their freights. Only in one or two instances these chartered ships which we chartered on a lump-sum basis made a sufficient amount of freight money to pay their chartered hire for the voyage. The economical result of the dispatch of the other vessels was an actual loss. The freight did not pay the cost of the hire of the vessel, without saying anything about the shore expense at either end or management expenses in London.

Q. Having regard to the prevailing rates of freight in the markets of the world for the use of steam vessels, could freights
232 be carried during that period with any remuneration to the shipowner on rates of from 13 shillings 9 pence to 22 shillings 6 pence, such as you were charging.

A. You mean with that rate for the entire cargo?

Q. Yes.

A. No.

Cross-examination by Mr. BAYNE:

Q. In giving your answer to the last question as to whether during that period freights could be carried remuneratively or at a profit if the charges for grain carried on the ship were from 13 shillings 9 pence to 22 shillings 6 pence, I observed you hesitated before giving your reply.

A. I did not understand his question and wanted to know if he referred to an entire cargo of those commodities.

Q. I see. In giving that answer you assume that part of the cargo should be carried for 13 shillings 9 pence and part for 22 shillings 6 pence?

A. No. I should say for a full cargo at 22 shillings 6 pence, if you like. I understood by his question that he referred to various periods of time, and I hesitated for the reason that I had in mind that we chartered one ship at the rate of 20 shillings, and his question would carry with it the possibility of carrying a full cargo of grain at 22 shillings 6 pence in a ship that cost 20 shillings.

Q. In that event you would make a profit?

A. On the face of it; but you will bear in mind that, in addition to the cost of the vessel, you also have agency fees and expenses of that sort at both ends as well as the management expense in London, which would probably eat up all of the extra 2 shillings 6 pence.

If we were able to get a grain cargo of 2 shillings 6 pence above the amount which we paid per ton for chartering the vessel, any sum above that would be profit, I would say, probably the 2
 233 shillings 6 pence would about pay the additional expenses I have referred to. I could not say whether the cost of chartering vessels during the period referred to, from October 29, 1902, to April, 1903, was greater than it had been for the preceding 2 or 3 years. We were not in the South African trade up to the commencement of our service.

Q. But you had, as a man engaged in general trade, some knowledge of what charters cost, hadn't you?

A. Only in the direction of the trades we were interested in, and we would not know specifically enough to speak of it in a certain way—about rates to South Africa.

Q. What other places did you do business with prior to that time?

A. With South America only.

Q. In chartering ships for your South American trade were the rates approximately the same as were charged, considering the mileage, for the South African trade?

A. No. Much less. For the reason that ships going to the River Plate were always assured of a cargo from that section.

Mr. KIRLIN: Return cargo, you mean?

WITNESS: Yes; we were always assured of a return cargo from that section; while ships chartered for South Africa had to proceed from there in ballast, and, of course, that would be represented in the price of the hire of the ship.

Q. Were the general shipping conditions or supply of vessels for charter approximately the same during the 2 or 3 years preceding the date that you were engaged in the South African trade?

A. If you mean to South Africa, I would say, as a general proposition, no. For the reason that we went into the business at the close of the Boer War, and prior to that time the congestion in the
 234 South African ports was something fearful and caused a very great advance in charters.

I have no actual knowledge of what the cost of those charters were.

Q. Now, as to the vessels which you owned yourself and put into the South African trade, you made a profit, did you not, on carrying on those vessels at 20 shillings?

A. We did not get 20 shillings. We only run two of our own boats in that trade, and the rates on those were only 10 shillings.

Q. But if you had got 20 shillings you would have made a profit on the operation of those boats?

A. I am sure not. Otherwise our owners would not have chartered vessels and paid in the neighborhood of 23 or 24 shillings for them in preference to running their own boats.

Q. Perhaps they ran their own boats elsewhere at a greater profit?

A. In a more profitable trade, yes.

Q. But you do not mean by that that you can say that, considering the initial cost of a boat and the capital invested, they would

not have made a profit in carrying freight at 20 shillings on their own boats?

A. I don't think they would. Of course, when an owner charters a vessel, he figures all of that price in his depreciation in interest charges and all that in the cost that we pay for it—that we practically pay for it. Therefore I consider that if you had to pay 24 shillings for a chartered boat there would certainly be no profit in running it at 20 shillings in carrying cargo.

Although I mention 24 shillings as the basis of comparison, I do not mean to change my testimony that we chartered vessels during this period in two instances at 20 shillings, two other instances at 22/6 and 22/7, two others at 23, and only one at 24. The 235 figures I gave you were actual. The freights which we charged during the period in question were net freight rates. We did not charge any so-called primage.

The method of hiring vessels which I have referred to, namely, the vessel to pay all expenses except the shore charges, was the usual method of chartering vessels with us. Various shipowners have their own methods.

Mr. KIRLIN: Some make time charters, some lump sum?

WITNESS: Yes.

Q. (Paper shown witness.) I show you a list which you have handed me, on which are indicated the vessels you sent out and the dates of their sailing, and ask you what the tonnage of these vessels averaged?

A. As a guess, I would say that they averaged 5,500 tons dead-weight capacity.

I would say 4,500 tons minimum, 6,000 tons maximum.

Mr. BAYNE: I offer in evidence the paper, which will be marked Exhibit X.

Said paper marked Plaintiffs' Exhibit X, April 22, 1909.

HERBERT BARBER, recalled on behalf of the defendants:

By Mr. KIRLIN:

I have already testified as a witness for the plaintiff in this case. I have been in the steamship business forty-five years. I first started in England. I was in London for four years and in Liverpool for fifteen years. I began business in this country in 1880. I have been in business here continuously ever 236 since. My office at present is at 11 Broadway. I reside in Englewood, New Jersey.

During all that time I have been in the business of chartering or operating chartered ships, and have also been a shipowner during a large part of the time. At the present time we are managing owners of four ships. Ships that carry 7,000 and 7,500 tons dead weight. Those ships are about the same in size and type with the ships that were operated to South Africa by the conference lines during the period we are engaged in. We have also operated chartered steamers in the last ten or fifteen years very largely, all over the world, especially to China, Japan, River Plate and to France and to the

West Coast of South America. I have never operated vessels myself as a principal to South Africa.

Q. Nor been interested in the South African business during the period of this conference, from January, 1899, to June, 1903?

A. Only an agent during that time.

Q. I want to get some comparison between the rates of freight which were charged by the conference lines to South Africa during the period in controversy, as compared with the rates that were charged in the markets in other parts of the world, and for the purposes of comparison we will use, if you approve of it, a statement or table which Mr. Sulima prepared and Mr. Bayne hands me, showing what he states were the conference rates on grain to East London during 1899, 1900, 1901, 1902 and 1903. Will you look at that and see if that shows substantially the rates as you recall them (handing witness a paper)?

A. These were the quoting rates, or nominal rates, but by referring I find that during a considerable period the steamers carried no grain and no flour.

237 Q. But when they did carry grain or flour to East London, was it upon those rates or substantially those rates?

A. In March, 1900, for instance, when the rate was 40 shillings, you might then make a trade which looked to the shipping of grain in September or October. When the September and October dates come the rate is 50 shillings, but still he puts his grain in at the rate he booked in March. So that this rate only shows the asking rate during those months and not the actual rates at which they were shipped. When shipped, they would be shipped at the contract rate that was made. That is always so; with that explanation, you can use that statement.

Mr. KIRLIN: I will offer the statement in evidence. Marked Exhibit 2.

The WITNESS: To make a little further explanation, during the months when 50 shillings was charged for grain, I do not see that we carried one ton at 50 shillings.

Q. Taking East London as an illustration, that is the illustration that the plaintiff has chosen, won't you explain how the rate to East London compared in a general way with the rate to the other calling ports where the steamers went?

A. The rate to Cape Town was 5 shillings less and to Algoa Bay, 2 shillings, 6 pence less, or Port Elizabeth. That is the second port of call and East London is the first port of call; so that these rates would be subject to those deductions I have mentioned as applied to shipments going to Cape Town or Algoa Bay.

Q. Before proceeding to compare these rates with the prevailing freight rates in other trades, is there any circumstance or set of circumstances which applied peculiarly to the South African trade and did not apply to the other trades with which from necessity we must make comparison?

238 A. There are. One important circumstance is from South Africa there are no return cargoes. Ships going from there leave in

ballast. The exports from Africa are gold, diamonds and ostrich feathers which take very little ship room; although they export more than they import in value. Vessels have to proceed for return cargoes either to Java or Calcutta, or perhaps some have to go to River Plate. The original voyage would be from 30 to 35 days, and the ballast voyage would be from 20 to 35 days. On that second or ballast voyage, the ship would not have any earnings. She would have her wages and provisions for the crew and coal expenses. So, as a practical matter, the rates for the voyage from here to South Africa have to pay the remuneration and the only remuneration that the owner will receive for the use of his ship until she reaches the end of the second voyage where she can begin to get her return cargo; that is a fair statement of it. Many of the vessels that discharged out there came right back to New York on a round voyage and loaded again during this period. The vessels that we had been sending to these ports made their trips of that kind before and after this period. Return trips had been made before and after this period, from New York to the same ports in South Africa.

Q. Can you tell by that comparison how the length of time used in unloading during this period we are concerned with, compared with the period in normal times?

The WITNESS: I can speak of my own knowledge.

Q. The question is whether there was during this period
239 from January, 1899, to June, 1903, any approximate certainty about the length of time that a vessel would be employed upon a voyage such as existed in normal times?

A. During 1899, 1900 and 1901 there was not, but in the beginning of 1902, and at the end of the second half of 1902, things were in a normal state and you could fairly reckon how long the ship would be on the round trip. According to the schedule the rates went down in the second half of 1902 in quite a marked way. I had a shipment in 1902, in December, at 18 shillings, 9 pence.

The COURT: During the period of competition?

Mr. KIRLIN: Yes.

The WITNESS: I don't know. The freight rates had receded. The freight rates had actually receded as the conditions in South Africa improved. Comparing these rates with rates in other parts, as we must, I state that these delays, such as I say existed in South Africa during the period you have mentioned, did not exist in other places.

Q. That is other places with which you were going to make a comparison?

A. They did not. The fact that I could not tell when I booked a shipment to South Africa during this period, up to the middle of 1902, how long the ship might be delayed would enter into and constitute an element in fixing the rate charged during that period. It was reasonable in my judgment that it should have done so.

The COURT: The witness is an expert witness, and I think we must receive his opinion.

Q. The question I have asked you is what the normal length of time is for a voyage by such ships as we used at the time in con-

240 controversy from here to South Africa, with cargo, and back to New York again, making the round voyage, with intent to reload here?

A. About three and a half months.

Q. Will you not call our attention to some instances of the length of time that vessels making such round voyages actually occupied in 1900, 1901 and the first half of 1902?

A. The steamer Caspian left New York on the 16th of December, 1909—The Susquehanna left here December 2, 1899—and did not sail again on a subsequent voyage or come back again until the 18th of May; that makes nearly six months. The steamer Maristo left here on the 26th of September, 1900, and did not get away again or come back until the 21st of February, 1901.

Q. Suppose you state in passing, if you know, whether those were vessels calling at any of the ports, or whether they were vessels that were chartered for the service?

A. The Caspian was a chartered vessel; the Maristo was a chartered vessel. The Clan Cuming—

By the COURT:

Q. What was the length of the round trip that you spoke of?

A. The Maristo, September 26th and returned February 21, the following year; October, November, December, January, February, five months.

By Mr. KIRLIN:

Q. What I want you to do is—I don't want you to go through the list of all the steamers, but merely pick out a few illustrative instances and state whether they were ships that were chartered for the business or whether they belonged to the conference?

A. The Clan Cuming belonged to the Clan Line.

241 By Mr. BAYNE:

Q. That is Cayser & Co.?

A. Yes, Cayser, Irvine & Co.—she sailed from here on the 22nd of November, 1899, and did not get away on her next sailing from here until the 7th of August, 1900.

By Mr. KIRLIN:

She made a round trip. I am speaking now only of those that went down and came back in ballast. I think some of those ships were less than three months and one 114 days on the Coast discharging. In addition to the long time it takes to discharge, it takes a long time to get back because they get so foul with grass growing that they cannot make half the speed back again. The marine growth is bad.

By the COURT:

Q. What was the last chartered vessel?

A. The Clan Cuming is one of the Clan Line boats. The Trojan, a chartered boat, left on the 28th of December, 1900, and got away on her next voyage on the 30th of July, 1901.

By Mr. KIRLIN:

She made a round trip, back here.

During that period the shipping trade of the world was in a good condition. Steamers were earning good freight in all directions. The value of tonnage was high.

Q. And the cost of building and chartering was high?

A. The cost of coals was high, also.

Q. When I say during the period, I am limiting it now to the time that my friend and you have limited it; that is 1900, 1901 and the first half of 1902. That is the time the conditions were
242 abnormal. How did the rates which were charged to South Africa during that period, 1900, 1901 and the first half of 1902, compare with the rates that were charged upon similar classes of merchandise to other places?

Mr. BAYNE: I object to that kind of a comparison as irrelevant and immaterial.

The COURT: It does not strike me that the standard is very well established.

Mr. KIRLIN: The line that I purpose going into, with your Honor's approval, is this, and it seems to me the only way by which we can make any accurate measure of the rate is, how did the rate compare, which we charged, with the rate which was charged, for instance, to South America, the West Coast of South America, and how did the length of the two voyages compare. It is always a practical matter to a ship owner whether he will send a ship in one trade or send her in another trade. If he can get more in one than the other he will send it that way, and in that way a certain equalization of rates worked out all over the world.

The COURT: If you can show what the normal length of shipment, of a round trip is—

Mr. KIRLIN: I purpose showing the ordinary time.

The COURT: Practically the same kind of boat?

Mr. KIRLIN: Yes, the same kind of boat, the same kind of cargo and then compare the two with the then conditions.

Q. With what trades can the rate that you charged here during the period mentioned be, in your judgment, fairly compared?

A. As compared to the rate to River Plate, the rate to Valparaiso, the rate to China and Japan.

The length of the voyage to the River Plate is 25 days.
243 The length of the voyage to Valparaiso is from 37 to 40 days.
I am answering with reference to the same class of ships.

Q. You say 35 days to go to South America?

A. They are interchangeable; sometimes one goes one way and sometimes the other.

The time of unloading in River Plate and Valparaiso and China and Japan compared with South Africa in normal times were about the same. The length of time of the voyage to China and Japan is about 65 days.

Q. What were the rates during this period, and perhaps you had

better specify what period you are speaking of—to Argentine; that is, to River Plate?

By Mr. BAYNE:

Q. Have you any knowledge as to whether the ships engaged in carrying freight between New York and Argentine operated in conference and under a trust agreement?

A. I know about it; yes.

Some of them did, some of them did not. The larger part so operated. Those are the ones relative to which I am making comparisons. During part of the time they were in conference and part of the time they were not.

The WITNESS: After the conference was entered the River Plate trade went up.

The COURT: You may show what the rate was with the vessels that were not in the so-called trust.

The WITNESS: There was no trust.

Q. What kind of a conference do you refer to?

A. They met together to make rates and to arrange the sequence of sailings.

244 Mr. KIRLIN: Mr. Barber says that part of the time there was a conference on and part of the time there was not. Would it not be illuminative for us to get it during both periods, so that we can judge for ourselves?

The COURT: I think I will permit him to show what the rate was as the result of the conference, and also what the rate was for those shipments when they were not shipping under the conference arrangement.

The COURT: First, ask what the rate was independent of the conference.

The WITNESS: 1901 and 1902 there was a conference then, yes.

Q. The first thing the Court permits me to ask you is what the rates were during this period when there was no conference?

A. In 1904 I think the conference ceased.

The conditions were the same in 1904 in that trade that they had been previously. After there ceased to be any conference the rates went up about two shillings a ton on case oil. We had charters made at higher rates after the conference broke up than we had before. During the conference they went from 25 to 27 shillings, 6 pence, and after the conference broke up, about a year or eight months, they were higher; 27 shillings, 6 pence all around. There is a return cargo from River Plate all the time.

Q. Taking into account the fact that there is a return cargo, and taking into account the relative length of the voyage to River Plate and to South Africa, how did the rate to River Plate compare with the rate which the conference was charging to South Africa during the period from 1900 to the middle of 1902?

A. I think the rates were better to the River Plate than they were to South Africa.

245 By that I mean higher. More profitable to the ship owner.

Q. They were more profitable to the ship owners during the period when they had no conference than they were during the conference?

A. For a certain time afterwards, yes.

The West Coast of South America I can only quote you the rate at present; I have not got the rates that were ruling in 1900, because we were not in the trade then. So far as the physical conditions of the freight are concerned, they are much better than they were a few years ago. They are about the same that they were in 1900, 1901 and 1902.

Q. At the present time how do the rates of the world compare with the rates that prevailed generally in this period; I am not speaking now with reference to a few pounds or a few shillings one way or the other, but in a general way?

A. The rates are lower than they were in the period in question. The cost of building ships is less, and the cost of chartering ships is less. They are now lower.

Q. Could you state with approximate correctness about the percentage that freights are lower now than they were in 1900, 1901 and 1902?

A. It varies so. The charter rates are one-half what they were then. In freights they are probably 25 per cent less. They are higher now than the rates that were charged to South America in 1900, 1901 and 1902. They are as remunerative to ship owners as the rates charged at that time to South Africa.

Q. What is the present rate for standard products, provisions and flour to the West Coast of South America?

A. On Class 3, in which flour is classified, the rate to Chile is 39 cents per 100 pounds; that is, 37 shillings, 6 pence for twenty 246 hundred weight. Valparaiso, Coquimbo and Iquique.

Q. How do the rates that were being charged by the conference to South Africa in 1900, 1901 and the half of 1902 compare with the rates then prevailing to China and Japan?

A. China and Japan were about the same as to South Africa. We were getting from 30 to 40 shillings a ton at that time. The distance was longer to China and Japan. We got a return cargo always back from those ports. The length of the voyage to China compared with the length of the voyage to South Africa, plus the ballast voyage that necessarily followed it, is about the same thing. The rates to Para on the East Coast of South America were about 30 shillings per twenty hundred weight. Para is under 3,000 miles, half the distance to South Africa. The rate is about 30 shillings. I have not Porto Rico. I have Havana, if you like; I can give Havana rates. The present rate from here to New Orleans by vessel, by the Morgan Line, is nearly 40 shillings per ton, 42½ cents per hundred pounds. I am not good on coasts, it is about 1,500 miles perhaps. It is less than a quarter of the distance to South American ports.

By Mr. PAYNE: There is only one line, the Morgan Line.

By Mr. KIRLIN: I think they make the same rate to Galveston.

From all the places I mention, except from South Africa, there are return cargoes.

Q. Now, Mr. Barber, speaking from your knowledge as a ship owner and an operator of chartered vessels, and from your knowledge of the trades and the value of the tonnage, the prevailing
247 rates of freight in other markets of the world at that time, what is your opinion as to whether the rates charged by the conference lines on flour and grain to East London, as stated in this exhibit, Defendant's Exhibit 22, prepared by Mr. Sulima, were or were not unreasonable and excessive?

A. They were not.

The FOREMAN: May it please the Court, does that include the 10 per cent that he spoke of, or is it the net rate?

I mean to include the 10 per cent.

The FOREMAN: He quoted 42 shillings and plus 10.

Q. Mr. Barber, Mr. Thompson, or rather Mr. Sulima, has given evidence as to the amount of shipments he made during a certain period, the amount of freight that he paid, and the amount that he received back as preferred rates from time to time. I think he said that his freights during the period from January 1, 1899, until his withdrawal from the conference lines in the middle of 1902, amounted to about \$180,000. How did his shipments compare with the shipments of the principal shippers to South Africa during that period?

A. Oh, I think he was about the fifth or sixth; there were five or six larger shippers who shipped three or four times as much as that.

There were perhaps ten or twelve that shipped as much as he did. It had been the practice in South Africa for merchants occasionally to charter and buy ships to carry their own cargoes.

Q. Were there some ships chartered by merchants during this exact period that we are dealing with?

A. There were quite a number chartered by Houston & Company for government stores, government shipments to South Africa
248 from this line, and there were some chartered by Arthur May & Co. for full cargoes of flour. I testified yesterday that Sir Francis Evans had entered the firm of Donald Currie & Co. in March, 1900. He is not living. He died about six or eight months ago; it may be longer; but within twelve months of the present time, say. Sir Donald Currie died last month, or this month; I think this month.

Q. Mr. Barber, you are charged with being a conspirator in this action. Did you ever sign any agreement with any of the defendants in this action to carry on steamship service to South Africa?

A. Did I ever? I signed an agreement to act as agent for them here.

I did not sign any agreement to participate as a principal in any way during the period in question. In the early stages of this matter I had an interest with one of the principals for two or three

years. It began in 1893; in 1896, I think, was the last that I had. It was about three years. That was with two of the defendants, with the Union Line then and Cayser, Irvine & Co. Not the Union Castle.

Q. During the time that the plaintiff complains of, from January 1, 1899, to June 1903, just state explicitly what your entire connection with the conference lines was?

A. I was an agent.

I was paid a commission of the freight of the shippers. I had not any contingent interest at all. I was paid on a commission basis entirely. I communicated during that period as my principal, with Cayser, Irvine & Co. and with the Union Mail Steamship Company until March, 1900, and after that with the Union Castle Steamship Company.

It has been stated that Messrs. Norton & Son and we held certain conferences, or conferred together here in New York. Our
249 conferences here related to the details of loading the ships and the engaging of freight for them, and the dates they would be dispatched. They related to the details of the instructions we had received from London, entirely.

Q. You also stated, or somebody stated that the agents from time to time made recommendations. What was the nature of the recommendations?

A. Well, if we recommended we wanted more tonnage or less tonnage we would tell them, or if we wanted the rate raised or lowered, we would recommend it.

That was a recommendation that related to the exigencies of the movement in the trade. We had not any determining power here among ourselves as to policy, or rates.

Cross-examination by Mr. BAYNE:

I gave some testimony the other day relative to the cost of chartering vessels by the ton during the period of 1899 to 1903, inclusive. I said that vessels could be chartered by the ton during some of that period, for 30 shillings per ton, and that it varied between that and something more than that and less, more or less. Toward the latter part of the period less than 30 shillings a ton. I should think during the first part of the period it was not less than 30 shillings a ton. It was less than 30 shillings a ton at the end of 1901 and 1902. Perhaps the beginning of 1902, I had better say. In the latter part of 1901 a shipment was fixed at 28 shillings, 9 pence. When I say the latter part of 1901, I mean the last three months.

Q. Does that 28 shillings, 9 pence per ton cover the first part of 1902?

A. No; I think rates went up again toward the beginning of 1902. The first part of 1902 I think they went up higher.

250 Q. Did they go as high as 30 shillings a ton?

A. A little more, perhaps. 31 shillings, 6 pence, something like that.

That would be about the rate which they cost per ton in the first part of 1902, but they would cost demurrage, too, which made a very important item on the chartering of your ships.

Q. Now, for the period prior to the first part of 1901, about what was the charter rate per ton?

A. Steamers can hardly be fixed at rates at that time. They were all timed or time charter.

Q. You testified the other day as to the charter price per ton. Didn't you mean that they were chartered at that price per ton?

A. Occasionally a ship would be chartered at a ton, but if you wanted three or four steamers you could not get them.

In most instances they were chartered on time charter during that time. The charter price per ton would not be a fair representation of what it would cost to get them. In 1900 there were not many ships fixed on rates; they were mostly fixed on time charter during that period.

Q. As to those that were fixed on charter price per ton, about what was the rate in 1900?

A. Well, you would naturally get a ship at 30 or 32 and 6, something like that.

Those you did get were at that rate, something like that. In the year 1899 the rate was higher. There were very few ships chartered during those periods at rates; they were mostly chartered on time. It was an uncertain rate of freight. A man might want a ship and not get it for three or four months. When you did get them they cost anywhere from 27 shillings, 6 pence to 32 shillings a

251 ton. That would mean for the voyage, yes. I have not with me a copy of any of the charters, a model of any of the charters where the charter was by the ton. I can produce this afternoon a copy of one of the charters where the charter was by the ton. Sir Francis Evans, during the period that he was engaged in the conference, was not represented by Norton & Son. He was the managing director of the Union Steamship Line, represented by ourselves. When he went into the firm of Donald Currie & Co., in 1900, then he was represented on one side by Norton and on the other by ourselves. Norton & Son represented in the conference, when it began in 1903, Bucknall Brothers, I do not know the firm name exactly, Bucknall's and Donald Currie & Co. The old firm of Donald Currie. I believe Bucknall Brothers continued in the conference from 1893 until they were absorbed or incorporated in the Bucknall Steamship Line, Limited. I did not follow the ramifications of their business. All the time I knew of them in the business Norton & Son represented them. After the Bucknall Steamship Lines were incorporated Norton & Son represented those lines, so that from 1893 on to 1903 Norton & Son represented one firm or another that was in the conference.

In the latter part of 1902 the conditions on the coast, the South African Coast, had become about normal then.

Q. You have said something about the rates charged after the

conference in the South American trade broke up. You said that the rates of freight increased?

A. Not immediately; there was a short time when there was some demoralization and then rates went up afterwards, the rate on case oil, for instance.

There was a short time of competition, during which the rates were larger. That was followed by a period when competition
252 had not yet stopped. This conference that I have mentioned here to-day was not the one that I referred to the other day when I was asked something about the District Attorney of the United States. I think it was in 1903 when this South American conference ceased. It was not in the month of June.

Q. Was it the same time that this conference that is involved in this suit ceased that that ceased?

A. O, no; I ceased it. I became an opposition factor in the trade and have been ever since.

Q. You were a member of that South American conference as a principal, weren't you?

A. I was an agent for a line. In the years 1900, 1901 and the first part of 1902 conditions were abnormal in the South African trade. They were normal in 1899.

Q. Were the conditions in 1899 in the South African trade relative to the owners of ships—I mean the owners of steamship lines—about the same in 1899 that they were in the latter part of 1902?

A. No; they were becoming congested in 1899; there began to be trouble and tension in the end of 1899. In the first part of 1899 they were substantially the same as they were in the year 1902. It was about the middle of 1899, the second half, that they began to become congested.

Q. When you say that in 1904 the South African trade rates went up from 25 shillings to 27 shillings, how long was that after the conference ceased?

A. Oh, about fifteen months or two years, perhaps. Rates had not gone up all over the world, but there was demand; going to the River Plate we got higher rates. It was purely a matter of demands.

Q. It was not due to the fact that the conference ceased?

A. I do not know what happened; that is all I know. There was
253 not any conference in the China-Japanese trade that I have referred to, not in that time, I think. In 1899 and 1900. I think the conference in that trade began about 1902, 1901 or 1902. I was a member of that conference, too.

Q. The rate charged on grain is a fair test for comparing rates at different times, isn't it?

A. To some countries no grain goes, but either grain or case oil goes. Case oil is about the same weight and measurement as bag grain. It is a fair standard of comparison in some ways. The rates of grain at one time with the rates of grain at another time is a fair rate of comparison with other things at those corresponding times. I do not think the conference lines had any greater trouble in carrying their goods to South Africa than the lines that com-

peted with them from time to time. In the South African trade vessels did not always come right back to this country. Some went to India. Some to Java. Some went across to Santos for coffee, in Brazil. Some went to Bombay and Vizepacatan. There were not many of these vessels out of the charter after they had discharged in South Africa. They mostly came back again.

Q. Were not a great many of them merely chartered to go to South Africa, and thence they went picking up freight on their own hook?

A. Not in the days we are speaking of. In normal times you can get them to go on their own business. Sometimes it did happen during those times. Not half and half. It was a very exceptional thing during the years in question for them to do that.

By Mr. ULLO: To go and discharge and go on their own hook. During the year 1899 we loaded ten boats that did not belong to the shipowners, did not belong to the conference lines.

254 Q. How many had they at that time, the conference lines, more or less; you are in the shipping business and you know how many Bucknall Brothers had?

A. I could not tell you. I have only got here my own line.

Q. Of your own line how many steamers did they have in 1899, not going to Africa; how many did the conference line own in 1899?

Mr. KIRLIN: All over the world.

Mr. ULLO: That they owned all over the world.

A. About one hundred, the two lines I represented, only about one hundred. Bucknall in his lines about the same. We chartered outside boats then, during that year. We chartered mostly by time charter. I spoke of some charters by voyage. There were some in 1899 and some in 1900. There were some chartered for a voyage, but the bulk of them were time charters. How many for a voyage I cannot tell you right away; I cannot tell you by this list.

Q. Who owns those charters; do you have them in your office?

A. We had for a time; I do not believe we have them now, but I can refer and find out whether we have time charters or not.

Q. How many lay days had you contracted for in those voyages?

A. They generally gave us about thirty or forty days for loading and discharging.

Q. How many demurrage days beyond that had you in the charter; how were they to be paid for as compared with the rate?

A. About forty to sixty pounds a day, according. A voyage charter means a voyage by which a vessel is taken from this port to any of the South African ports and these vessels must consume

some time here to load, which goes with the loading days and
255 which are called lay days, and there are so many days on the other side to unload, and those are also called lay days, and if you wanted to keep the vessel for more than that time you paid perhaps forty pounds a day.

Q. And for all this time so consumed the charter during that

time, the charter rates being of law days and the time of the voyage was what you said?

A. Whatever the rate was.

Q. 27 shillings and 6 pence, whatever the rate was?

A. Yes, sir. The 27 shillings and 6 pence and whatever the rate was governed the time consumed during lay days and during the voyage. It covered all the expenses of the trip, consumption of coal, and wages, and covered everything else.

Mr. KIRLIN: I do not think there is 27 shillings, 6 pence.

Mr. ULLO: Whatever the rate was; I do not care about fixed rates.

Time charters are different. We take a vessel and pay for the vessel by the month, and then we keep it as long as we please and pay so much for the time, or whatever rate we agree upon. During that time the expense of wages goes for the owners of the vessels. We have only to pay for our coal and the port charges. And you have to bring her back and re-deliver her in Europe or in the United States, wherever it is. We engage the cargo here before a vessel comes in, as a rule.

Q. When you have enough cargo engaged then you fix a vessel?

A. Oh, no. Ships come along if we have got half a cargo or a third of a cargo.

Q. You had no regular date of sailing, as you have already said?

A. Oh, yes, we had; we had schedules which we were working on. But no dates for sailing; for example, every Wednesday, 256 even if we advertised for a special day of sailing we postponed that day of sailing if we wished to. Sometimes the merchants wished us to.

Q. I do not care for whose reason, but the reason was you sailed according to your wishes, not according to the advertised day of sailing?

A. That is right. We took into consideration in the making of the rates of freight the length of the voyage. That is part of the consideration for the rates of freight, because the longer the voyage the longer the ship is going to be over it, and therefore, we should get more money for it. The longer the voyage the greater the expense for the owners.

Q. Now, is it not a fact that among the conditions of the conference there is this which I read to you: "The length of the passage from New York to or off shall not be less than thirty days"?

A. I do not know.

Q. Without reading it to you, was not their agreement of the conference that none of the vessels should make a passage in less than thirty days?

A. I do not know. I never heard of it.

Q. Don't you have a copy of the conference signed by Cayser, Irvine & Co.?

A. No, sir; never had it.

Redirect examination by Mr. KIRLIN:

When vessels were taken for a lump sum a certain number of days were allowed for loading and discharging, and that number would vary somewhere from thirty to forty. That is about the time that would be occupied by a vessel under ordinary conditions. It ordinarily takes for loading from ten to twelve days. That would leave you from twenty to twenty-eight days at the other end. When we took the boats on that basis, the 30 shillings or 32 shillings, 257 6 pence, or whatever it was we paid for them, simply covered the use of the vessel until those lay days expired.

Q. And for every day that you kept the vessel or that the vessel was kept, whether you kept her, or however she was kept in delivering the cargo up to the time she was finally unloaded and in a position to be turned over to the owners, you had to pay demurrage for her so much a day?

A. My principals would have, the charterers, my principals would have. That would be forty to sixty pounds a day for that kind of a ship.

Q. In view of the delays that you had down there, how much would that demurrage amount to as compared with the freight you had to pay?

A. I have heard in several instances of how much they paid. It comes in the course of my business; I have that information sent me.

Sometimes we paid more than half the amount of the charter in demurrage. More than half of the freight rate in demurrage in addition. As a practical matter, that was the reason why ships could not be chartered in that form in that service.

During this period from January, 1899, to June, 1903, there were claims for shortage and damage which the conference had to meet. The freight rates did not cover those. That was affected materially by the conditions I have described down there. The facilities for discharging were all pre-empted by the government and the cargo would lay around on the docks and on lighters for weeks before we could get rid of it, and before it got into the merchants' hands it was damaged, and of course claims were presented, and while we were not legally liable, we had to arrange in order to keep in the business. The congestion began about the year 1899.

258 Q. But previous to that, had there been any difference in the freight rates of steamers on account of the war or the probability of war at that time?

A. Rates were stiffer on that account, were higher.

Q. Was the class of vessel that was used by the conference in this trade a type which was specially adapted for use in carrying war materials, stores and officers, troops?

A. Very suitable for stores and live stock, and that sort of thing. There was from the time the threat of war began an increasing demand for ships of that kind. The charter rates for them appreciated accordingly.

Q. Now, you have been asked some questions as to the number of vessels that the conferees owned. I think I have not asked you

whether the Clan line was in other trades besides the line from here to South Africa. Were they?

A. They were. From India, from England to India and to South Africa. They used their own vessels in that trade almost entirely. The Union Line and Union Castle Mail Steamship Company were in the South African trade from England. The Union Castle Mail Steamship was incorporated, and was also in that trade. The Bucknall Steamship Lines, Limited, were in the Australian and in the English trade, both from this country and from England.

Q. You were asked by Dr. Ullo whether you always sailed your vessels as advertised. What is the fact with regard to the periods intervening between the dispatch of vessels?

A. We intended to dispatch a ship about every two weeks. These were freight lines which took no passengers and no mails. It was subject to be moved—the same as freight, as occasion demanded; subject to that the sailings were fairly regular.

259 Recross-examination by Mr. BAYNE:

Q. Did not the conference lines have vessels of their own which they did not use in this trade, but instead of using them they chartered vessels?

A. They used them for somewhere else, in other trades they used them.

By the FOREMAN:

Q. There is one question I asked you about the other day, your Honor. The men of the jury are not quite clear in regard to the statement Mr. Barber made in regard to the conference of Norton & Co. and Barber & Co. when there was a competitive ship and they had a fighting ship, what that conference did, did they make the rates themselves?

A. No, they did not; the rates were made from London.

Q. The conference did not get together and make the rates in special instances?

A. No, sir; we had advices from London what rates to charge.

Q. You do not mean the rates on that fighting ship were agreed upon by the conference, do you?

A. We got word from London what rates to charge to the shippers.

Q. The rates were fixed, however, by the members of the conference, however they gave you instructions, they were the members of the conference that gave you instructions?

A. Our principals gave us instructions.

Q. And the members of the conference gave you instructions as to the fighting ships?

The FOREMAN: I understood it differently. I understood that they conferred here in New York.

Q. But you apparently advised your principals in London, made suggestions as to what were the rates that should be made?

A. Not frequently; we did occasionally.

Q. How often did you meet with Norton & Son to discuss these questions?

A. We would get together any time; we were close together. Sometimes three or four times a day we were together, and those were the matters we discussed at those times.

Q. And then you would write to your principals giving your recommendations?

A. I cabled them.

Q. And did they not frequently adopt your recommendations?

A. No, they did not, I am sorry to say.

By a JUROR:

Q. Were these rates made by this conference during this time based on the law of supply and demand, the amount of business that you were trying to get?

Mr. BAYNE: With the jurymen's permission, I must object to this defendant giving his opinion on that subject. We claim that they were not.

The JUROR: You asked him whether he made the rates. How did he make them?

Mr. BAYNE: How he made them?

The JUROR: What was it based on. Was it based on the amount of business available?

The WITNESS: That was so; I think they were.

The JUROR: Your Honor, I want to have it decided in my own mind, if I can, whether this was a fixed rate, an arbitrary rate, or whether it changed from time to time as the business demanded?

The WITNESS: The schedule shows it varied from time to time; they changed from time to time; they went up and down.

261 Redirect examination by Mr. KIRLIN:

Q. What the juror wants to know is when they were changed whether they were changed in accordance with the law of supply and demand, generally?

A. I say that is the rule, yes. That is, the demand for cargo, the tonnage available, the freight market of the world generally; and were not mere arbitrary rates fixed by the conferees without regard to the usual laws of trade.

Recross-examination by Mr. BAYNE:

But during the first two years of the conference there was not anybody in competition with the conference to force them to lower their rates if they chose to make it high.

By another JUROR:

Q. Can you state, Mr. Barber, how chartered vessels would take from 30 to 40 days to load and discharge? Were these chartered vessels loaded and discharged within those days regularly, or were there questions of demurrage?

A. In normal times there were, but in the period in question they generally ran over the time and incurred demurrage. It would vary by the rate of freight charge. The question of demurrage—would have a bearing on the rate of freight because the charterer had to pay demurrage.

By Mr. BAYNE: In other words, we will assume the rate to be 32 shillings and 6 pence, that is with a view to a possible payment by the charterers of demurrage. In addition, making the freight rate really higher than 32 shillings and 6 pence; that is so.

262 A JUROR: That is the charter rate?

The WITNESS: If the charter rate were 30 shillings with 40 pounds demurrage, the charterer would have to have another rate for flour, not only covering the 30 shillings paid for the ship, but also for the demurrage in South Africa.

Another JUROR: For instance, if you chartered a ship for 50 shillings you could not stipulate at the same rate?

The WITNESS: No.

The JUROR: You would have to take into consideration the possible demurrage you would have to pay?

The WITNESS: Yes, sir.

Redirect examination by Mr. KIRLIN:

If it had happened that one of these vessels of which there were a number were detained down there from two to three months in addition to their normal period of discharge, had been a vessel on which you had demurrage days we would have had to pay, that is, the conference would have had to pay the owners of that ship 40 to 60 pounds a day in addition to the lump sum of freight. The possibility of detention and extra expense was the thing that was taken into account in fixing the freight.

Recross-examination by Mr. BAYNE:

Mr. Kirlin asked me about delays of two or three months. 127 days, I think, is the record down there for unloading. I think in my previous testimony I mentioned the ship. That was not the only ship; I think we could give you plenty this afternoon by people who were down there.

263 By the COURT:

Q. During what period of time was this?

A. During 1900 and 1901.

By Mr. BAYNE: It began in the early part of 1899. The Boer War began in 1900, and that was what caused the abnormal conditions I refer to.

Recess.

Mr. KIRLIN: Your Honor, owing to being constantly occupied with the conduct of this case, I have not been able to get our requests in any sort of form, and if I handed some up to you in the rough,

would it be consistent with your practice to allow me to suggest anything else at the conclusion of the charge?

The COURT: Yes. Both sides may do that. The plaintiffs have handed me some requests. Very likely I will charge some of the requests.

Mr. KIRLIN: There are only a few points we specially want.

The COURT: Oh, yes, after the charge has been made in chief you may suggest anything farther.

FRANK TAYLOR, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. KIRLIN:

I am located in New York; I am superintendent of what is described in the papers here as the Bucknall Steamship Lines. Bucknall Brothers are the managers. I have been in the employ of the Bucknalls, before and after incorporation, about fourteen
264 years. I was an engineer at sea; chief engineer. I was made superintendent in February, 1900.

I was down in East Africa, South Africa, in November, 1899. The day that I arrived in Natal, Dalney Hill—that was the name of the battle, that was the first battle that was fought on that morning that I arrived at Natal port. I was about a month in the port.

Q. I wish you would describe what the conditions were in the ports of East and South Africa at that time; speaking specially of Cape Town, Delagoa Bay, and East London, what were the conditions in those four ports during the time you were there?

A. Well, they were getting congested with cargoes and ships; there were four large passenger lines there. There are two German and three English that runs continually to South African ports. But there is others—three or four lines, such as Bucknall Brothers and others—that run regularly there with cargo. These two German and three English passenger lines I speak of carried cargo also. There were vessels there with war supplies at that time. The Johannesburg, in the port I was in, was practically full of government war materials. War materials were coming there at that period in considerable quantity.

Q. What are the facilities of discharging at Cape Town, is it a wharf port or a lighter port?

A. Well, it is a port with piers, but not a great deal of facilities for so many ships at a time—perhaps four or five. Many of them lay out in the bay and were discharged into lighters. But at Cape Town the lighters were congested, too, because they could not get sufficient lighters; Delagoa Bay the same. It is all lighters there, but at Natal the ships enter. At East London they enter, too, if the ships are not
too large.

265 Q. And what are the facilities for getting cargo away there?

A. Oh, fairly good, but it is not a large port. Three or four vessels at that time would fill the port inside, but, then, they discharge outside in lighters as well.

Q. How long while you were there were vessels taking to unload cargoes at three or four ports in South Africa?

A. Well, I can only judge that from the vessels I was in there. We were about a month there. About a month in unloading; but, then, we got better facilities than a chartered vessel would get, for this reason, that we had a good deal of government stuff in it; war material; and of course we got facilities from the government, and any ship that came for the government, we would get a little bit better facilities than others.

When I came back from there, I was then made shipping superintendent on the northeast coast for Bucknall Brothers. These ships of the Bucknall Steamship Lines and ships chartered that went to South Africa after that came under my supervision; all that came up to the northeast coast was all under my supervision. From my position and what I had to do with the ships, I gained a knowledge of the length of time they were detained down there in unloading. They would average perhaps 50 or 60 days. We had some there, such as the Mashona and others—I am not sure—Bucentaur, which was another that had a long time—perhaps three months.

Cross-examination by Mr. BAYNE:

With the exception of the two that you have mentioned, the average of the others for total time of unloading was 50 or 60 days. The port began to get congested in November, 1899, and got more congested up to the beginning of 1902. It commenced to go down then. It resumed normal conditions, I should say, about 1903. It had nearly resumed its normal conditions by the end of 1902, I think.

Q. The time when it began to get abnormal was in November, 1899, was it?

A. Yes, sir.

Q. Prior to that time it had been normal?

A. Well, it might be a little before that, because there was a lot of vessels going there for the government then that was congesting the ports, perhaps before. Perhaps a month and may be more. Before that it was normal. I was on the Johannesburg.

Q. How long would it take you to unload in November?

A. I think we were on the coast about a month. I do not know how long it took normally to load on this side for Africa. I was not here at that time. If it took ten days on this side to load and it unloaded there, in about thirty, it would occupy forty altogether in loading and unloading. Sometimes it takes longer than ten days or twelve days on this side. But at any rate, the part I know about, the unloading occupied thirty days in that individual ship. And that was in November, 1899.

Mr. KIRLIN: Now, if your Honor please, we contemplated giving more details about comparison with charter rates, but I think the jury want to get away, and I think they understand our position in this matter perhaps as thoroughly as they would with further evidence, and we have therefore concluded to rest and let them go to rebuttal.

The COURT: Have you any rebuttal testimony?

Mr. BAYNE: No, sir. The plaintiff rests.

Mr. KIRLIN: I suppose at this juncture the proper form of a motion with regard to Donald Currie, and the individuals sued as the firm of Donald Currie & Company, and the individuals sued as the firm of Norton & Company would be for the direction of
267 a verdict in their favor, on the ground that the cause of action alleged against them has not been established by the proofs. I therefore couch it in that form.

The COURT: I think I will rule, as the evidence stands, that the complaint should be dismissed as against Donald Currie & Company. All I can say at this time is that the complaint will be dismissed against those individual members of Donald Currie & Company, the original firm of Donald Currie & Company, and such as have since died. Now, who of them are members?

Mr. KIRLIN: There is no proof that anybody who is sued in the complaint as members of the firm of Donald Currie & Company were members of that firm at any time prior to the filing of the suit.

The COURT: The complaint will be dismissed as to them all then.

Mr. KIRLIN: Does your Honor deny the motion as to the agents of Donald Currie & Company?

The COURT: I do.

Mr. KIRLIN: May we have an exception? We also formally renew the motion made at the beginning of the trial, or rather, at the close of the plaintiff's case.

The COURT: For the direction of a verdict in favor of all the defendants?

Mr. KIRLIN: Asying your Honor to direct a verdict in favor of all the defendants, upon the ground that the offence, cause of action charged in the complaint against them, has not been established by the proof.

The COURT: The motion is denied.

Mr. KIRLIN: We except. We renew the motion separately also as to Barber & Company.

The COURT: The motion is denied as against all the defendants except such as are eliminated from the case by the action of the Court taken heretofore.

Mr. KIRLIN: We except.

The COURT (HAZEL, J.): Gentlemen of the Jury: You are to be congratulated upon approaching the end of this rather protracted trial, and I dare say that you welcome its finality with as much fervor as does the Court. I have noticed by your patience and your attention to the testimony that the facts of this case are not only interesting to you, but, indeed, I have noticed by the questions that various of your members have asked of the witnesses, that some of you, if not all, have a clear understanding of the questions of fact that the Court in this case deemed proper to submit to you. At all events, I notice that you gentlemen realize that you have a grave responsibility to perform in this case. And, in passing on this case,

the duties of the Court with reference to this controversy are also somewhat onerous, but, however onerous the responsibility of the Court, I feel that your responsibility is far greater, for, after all is said, it depends upon you as to whether these defendants shall be penalized for having violated the statute, as claimed by the plaintiff; as to whether the plaintiffs in their business have been injured, and as to the amount of damages, if any, that they have sustained.

The duty of the Court is ended when a fair exposition of the law has been given to the jury, and it is not my intention to dwell at any great length upon the details of the transactions or upon the evidence. I do not mean to be understood as saying that I shall not refer to the testimony. On the contrary, I shall speak of it in a general way, but not with the intention of impressing you one way or the other, or indicating what my opinion may be regarding any of these questions of fact.

It is my duty, however, as I have already intimated, to
269 instruct you as to the law, and in that respect, you are required by the rules of procedure to take the law as I expound it, and accept it at my hands, irrespective of what either one of the counsel may have said as to what his view is as to the construction of the statute or as to the intent of the legislature in enacting the law.

This action, as you know, was brought by the plaintiffs against the defendants under the provisions of an act of Congress, passed July 2nd, 1890, commonly designated as the Sherman Anti-Trust Law, and it will doubtless be acceptable to you, in the consideration of this question, which is proper to be submitted to you, to know what the law is and what Congress did for the protection of shippers as well as for the protection of the common carriers. Section 1 of the act, to which I call attention, reads as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal.

"Sec. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States or foreign nations, shall be deemed guilty of a misdemeanor.

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the District in which the defendant resides or is found, without respect to the amount in
270 controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Now, gentlemen, this action is based upon Section 7, which I have just read, and it is on the civil side of the Court. It may be that some of you disagree with this law; that in your judgment Congress infringed upon the rights of the individual or upon the rights of corporations in enacting such a section. But, gentlemen, we are not concerned with the wisdom of the law. It is the duty of the Court

and of the jury to accept the law as an act of Congress, and to apply the facts to the law, which the situation of the controversy warrants.

It appears by the evidence that various of these transportation lines, of which the defendants, Norton & Son, and the firm of Barber & Company, were agents, and by and with the co-operation of such agents, sometime in the year 1898 or prior thereto entered into an arrangement by which they agreed among themselves to make a certain tariff of rates or carrying charges from the port of New York to South African ports, and to refund a percentage or commission of 10 per cent. based upon the net amount of freight at the established tariff rates received and exacted by the companies from the shippers. It is not disputed that the refund was to be made upon the conditions that the shippers should transport their commodities by vessels owned or controlled by the companies in the pooling arrangement, and if, however, a shipper paid a so-called primage of 10 per cent. over and above the claimed established freight rates shipped any portion of his merchandise to South Africa in any other vessel or steamboat than such as were owned by the shipping lines in the arrangement, then no refund or rebate would be paid.

271 In other words, to entitle a shipper to receive back the 10 per cent. paid by him at the time of the shipment over and above the rate fixed by the conference representing the carriers he was required to make a claim after the shipment, setting forth that he was not directly or indirectly interested in any shipment to South African ports by any other vessels save such as were dispatched by the Bucknall Steamship Lines, Limited, Donald Currie & Company, the Union Castle Mail Steamship Company, Limited, Cayser, Irvine & Company, and later, after October, 1901, by the Hansa Steamship Navigation Company.

Now, gentlemen, if the said agreement between the carriers was in fact a combination to destroy or suppress competition in foreign commerce, it was an illegal combination, and was wrongful and tortious, and, moreover, each defendant contributing to the injuries alleged to have been sustained by the plaintiffs is responsible for the unlawful acts committed to effectuate the result save as I shall explain hereafter.

The statute, the act of June 2nd, 1890, which has just been read, forbids combinations or conspiracies which tend to destroy or restrict competition in interstate or international commerce between common carriers, and who would be competitors were it not for the illegal combination. Such an arrangement is in restraint of trade, and is therefore prohibited. That the entire trade between the ports specified in the complaint was not destroyed or suppressed is not at all material or important. It is enough, gentlemen, if the act of the allied defendants, who were combined together in making the agreement, tended to restrain trade between New York and South African ports, and further, that such agreement or combination tended to form or create a monopoly in such transportation and interfered with competition, or to a degree—no matter to what extent restricted it.

272 Now, before proceeding with my instructions, I wish to make clear to you the purpose the Court had in mind in dismissing the complaint against several of the defendants. There has been submitted to me a request to charge upon that subject, and inasmuch as the request substantially states my personal view of the law governing the question, I will submit my charge substantially in the language of plaintiff's counsel.

The motions to dismiss the complaint made by the Bucknall Steamship Lines, Limited, and the Union Castle Mail Steamship Company, Limited, were granted because the plaintiff's claim that they suffered damages during the entire period beginning April 15, 1899, and ending June, 1903. Now, the two companies above named did not enter the combination, according to the evidence, until 1900, and were not responsible, therefore, for such damages as were suffered by the plaintiffs during 1899. My dismissal of the complaint does not mean that the Bucknall Steamship Lines, Limited, and the Union Castle Mail Steamship Company, Limited, were free from responsibility for the combination complained of, but merely that as a matter of law they were not responsible for a part of the damages claimed. In an action of this character, gentlemen, you are not permitted to find a verdict for one amount against one defendant and for a different amount against another defendant. Therefore, the only defendants I have left in the case are those who were members of the conference during the entire period from 1899 to 1903, during which the plaintiffs claim to have suffered damage. The connection of the Bucknall Steamship Lines, Limited, and of the Union Castle Mail Steamship Company, Limited, becomes material in the consideration of your verdict to the following extent:

If you find that the defendants remaining in the case, or
273 one of them, or any of them, were from 1899 to 1903 engaged in the combination and conspiracy to restrain trade charged in the complaint, and you find that Bucknall Brothers or Bucknall Line, Limited, or Union Castle Mail Steamship Company, Limited, or any other person or corporations were, during any part of that time, engaged in the same combination or conspiracy with the defendants, then the defendants would be liable for whatever illegal acts were done by Bucknall Brothers or by Bucknall Lines, Limited, or by the Union Castle Mail Steamship Company, Limited, or by any other persons or corporations in combination with them in furtherance of the common purposes of the combination the same as though the illegal acts done by the Bucknall Lines, by the Union Castle Mail Steamship Line, or by any of the others, had been done by the defendants themselves. In the same way, the defendants above referred to would be liable for whatever was done by the so-called Hansa Line after that line joined the combination, to the same extent as though what was done by the Hansa line had been done by the defendants themselves. The law is that where an illegal combination in violation of the Sherman Act is formed and put in operation, every member of the combination, while he was a member of it, is responsible for every act done by every other member of the

combination during the same period, pursuant to its common purposes. Hence, as the defendants were members of the combination during the entire period mentioned in the complaint, they are responsible for the acts of Bucknall Brothers, Bucknall Steamship Lines, Limited, Union Castle Mail Steamship Company, Limited, the Hansa Line and any others who were in the combination with the defendants for portions only of the entire period.

If you will remember, the Court also dismissed the complaint as against the defendants Donald Currie & Company and such
274 individual defendants as composed that firm. The dismissal as to Donald Currie and Sir Francis Evans, of the firm of Donald Currie & Company, is not based on a failure to prove that they were members of the conference during the whole period complained of, for the evidence indicates that they were, but merely because they are dead, and no judgment can be recovered against a deceased person. The dismissal as to the other members of the firm of Donald Currie & Company is based on the fact that there was a failure to prove that the present members of the firm were in this firm of Donald Currie & Company, which was in the conference, during all the times complained of.

There are various definitions of the term monopoly, but it will suffice to quote a definition or elucidation from a decision recently handed down by the Circuit Court of Appeals for this Circuit. There, it is said—the decision which I refer to was in the so-called American Tobacco Company case, and the Court of Appeals quoting from a case decided by the Supreme Court of the United States, where a monopoly was described says:

“Its dominant thought now is, to quote another, ‘the motion of exclusiveness or unity,’ in other words, the suppression of competition by the unification of interest or management, or, it may be, through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be ‘unified tactics with regard to prices.’ It is the power to control prices which makes the inducement of combinations and the profit. It is such power that makes it the concern of the law to prohibit or limit them.”

275 And the Court stated further, that

“The authorities warrant the statement that a monopoly, in the modern sense, is created when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of commodities and thus to practically suppress competition.”

Now, gentlemen, it seems to me that although in this case the prices of commodities was not involved, yet the principles as laid down by the Circuit Court of Appeals would seem to apply here. There are different kinds of classes of monopolies or combinations in restraint of trade known to the law. We have the so-called trust, where the parties through arrangements suppress or destroy competition among themselves by assigning the shares of stock of corporations to another or to a board of trustees who are authorized and

empowered to conduct the business inter-state without interference or competition from any of the parties or corporations forming the trust, and second, where the illegal combination consists of a pooling arrangement in which those who are parties to the combination agree to drive out of business their competitors in foreign or inter-state trade or commerce so that they may practically have the field to themselves. Such contracts, as already indicated, are entirely against public policy, and are forbidden by the anti-trust act.

Now what is the specific claim of the plaintiffs? They claim that the arrangement between the carrying lines now before the Court, assisted by Barber & Company, Norton & Son and various of
276 these other corporations against whom however the complaint has been dismissed for the reasons already stated was a conspiracy and scheme to make profit and gains by monopolizing, and further, that the system of rates adopted by the combination, namely, the exaction of primage or of a forfeit of ten per cent. of the rates, coerced and prevented the plaintiffs, who were shippers, from shipping or transporting their vendable goods to South African ports by other vessels or carrying lines than those which were owned or controlled by the defendants, or the individuals who are still defendants in the case.

It is also claimed by the plaintiffs that the rates charged for transporting the property *was* excessive and unreasonable.

Now, gentlemen, as regards the asserted combination, the only testimony is not conflicting, and considering it together with the printed circulars, Exhibits A and B in evidence, and I think an unlawful combination such as the Sherman Act condemns is fairly proven by the plaintiffs. Hence I instruct you as a matter of law, that the defendants in violation of the anti-trust statute entered into a conspiracy or unlawful combination in restraint of foreign trade and commerce. By such unlawful acts the defendants, Caysar, Irvine & Company, Norton & Son, and Barber & Company and others, associated with them, created a monopoly of the transportation by water of the products of this country between the port of New York and South Africa.

Now the right of recovery herein depends upon whether the rate charged the plaintiffs was reasonable or unreasonable, and if it was unreasonable, did the defendants by their unlawful combination in restraint of trade coerce or compel the plaintiffs to pay a rate greater
277 than a reasonable rate, simply to effectuate the primary purpose of the combination, namely, to prevent competition in the transportation of merchandise. Plaintiffs claim that the primage exaction of 10 per cent. was wholly unreasonable and was in the nature of a forfeit, to coerce them to continue to patronize the vessels or lines in the combination. Now, gentlemen, notwithstanding the fact that I have stated to you as a matter of law that this was a combination forbidden by the Sherman Act, the question submitted to you is whether the rate was reasonable or unreasonable, and that is a question to be determined by you, and it is for you to say whether the 10 per cent. was charged to coerce the plaintiffs to patronize the same ships or not.

Evidence was given by the plaintiffs tending to show that conferences were held in this country to determine what the carrying rate should be, and that the agents or representatives of the lines in the combination reported their action to the London office or to their principals. This in my judgment, under the law, makes the agents liable, especially as they concededly profited by the violation complained of.

It is unimportant in my opinion that originally the plan of organization, or the combination was started in England. It is sufficient that the commerce of the United States in international traffic was and is concerned and affected by the action of the combination.

The defendants, however, claim that the rate exactions were not unreasonable or excessive, and that accordingly the plaintiffs have not sustained damage or been injured in their business; they claim that the plaintiffs voluntarily paid this rate, and Mr. Barber testified that in his opinion it was a reasonable rate. He says that it was open and not secret, and hence, you are asked to believe that there was

nothing unreasonable, in relation to this rate. He further
278 testified that it was the custom of common carriers between two ports to require the shipper to pay this 10 per cent. primage, and it was always regarded in trade by common carriers as a part of the legitimate rate, and the regular rate exacted of shippers.

The plaintiffs, however, offered evidence showing that the Hansa line of steamers originally were not in the combination, in that the said line carried freight at a less rate than the defendants, and that a so-called tramp steamer was put in the field by the defendants in order to affect competition in such a way that competitors could not compete with the rates fixed by the so-called fighting ships, the ultimate object and idea being to further effectuate the combination that had been previously formed by the defendants, and, indeed to make it stronger, by compelling their competitors to join in the combination. And it is further pointed out by the plaintiffs in this case, that in November, 1900, or 1901, the Hansa Line, after competing with the lines of the defendants, did join the combination, and thereafter likewise exacted this 10 per cent. as commission or rebate or primage, which the plaintiffs claim was an unlawful exaction. On that point, it is fair to say that you should consider that the defendants insist that the charge by the Hansa Line was no criterion or no standard of what was reasonable or unreasonable, because it was a quarrel between the lines of the defendants and those who were not in the combination; it was a question of cutting the price, and hence that there was no standard of reasonableness or unreasonableness, and hence, you should not give such testimony any controlling weight. In my judgment, the Hansa Line steamers charging very much less than the lines in the combination, ought not to have any controlling weight, because it was shown by the
279 defendants that it was a difficulty between rival steamship lines as to which should have the trade, but these are matters which you should take into consideration on the question as

to whether the rate exacted by the defendants of the plaintiffs was reasonable or unreasonable.

The next question for discussion relates to the damages which the plaintiffs insist they have suffered because of the wrongful acts complained of. Now, gentlemen, if you conclude from the evidence that the plaintiffs have been injured in their business in consequence of the unlawful combination in restraint of trade, by the defendants requiring them to pay an excessive rate of carrying charges, you will award actual damages in the nature of compensation, nothing in the way of punishment, or exemplary damages should be allowed. If in your judgment the plaintiffs are entitled to recover damages, it will merely be to make them whole—the damages which you believe they have suffered. It is for the Court to multiply, whatever in your judgment the plaintiffs are entitled to recover, under the anti-trust act. The Court has the power to treble the damages provided for by the act, and in pursuance of which this action was brought. You will understand, gentlemen, that it is not enough for the plaintiffs to prove the unlawful combination or conspiracy in order to recover damages. I have instructed you as a matter of law, that in my judgment the uncontroverted testimony in this case establishes a violation of the statute to which I called your attention. But that fact in itself does not entitle the plaintiffs to recover. The plaintiffs are only entitled to recover damages in case they have affirmatively established injury to their business, and within the rules stated. I repeat: That the anti-trust law has been violated by the conference and agreements resulting in a combination to restrain or interfere with foreign trade so as to stifle or restrain competition is not enough to entitle the plaintiffs to recover in this action. The burden
280 of proof is upon the plaintiffs to show that they have sustained injuries in their business in consequence of which they were damaged, and this must be proven by a fair preponderance of the evidence.

If the plaintiffs were not injured by being compelled or coerced into paying excessive or unreasonable rates, namely, this 10 per cent. additional, then this case is ended and your verdict manifestly must be for the defendants.

If in your judgment the rate charged by these lines during this period of time was not excessive, if it was reasonable and just, in view of the conditions and circumstances to which I will refer hereafter, then that ends the case, and you will pay no further attention to any of the questions here involved, for in that event, your verdict will be for the defendants.

If, however, the rate was excessive, and the 10 per cent. charged was to prevent the plaintiff from patronizing other lines, and if you believe that this rate was unreasonable and unreasonably exacted, then, in that event, plaintiffs are entitled to recover, first, the amount paid by plaintiffs for primage, that is to say, they are entitled to recover this 10 per cent. paid in addition to such rates, as the defendants, the common carriers, exacted; they are entitled to recover the amount of money which the defendants would have paid to the plaintiffs had they remained loyal shippers, and as I remember the tes-

timony, that is substantially shown and not disputed, that such amount paid by the plaintiffs to the defendants on account of the primage amounted to \$5,600. And, as I stated, if in your judgment such rate is excessive and unreasonable, the plaintiff should be entitled to recover the amount stated.

Of course, if you find from the evidence that the actual tariff of rates of the carrying charges included the 10 per cent. primage, and that the custom of common carriers was to exact such additional charge, and when so exacted it became plus the published rate the actual rate of transportation, and that such exaction in view of the circumstances and conditions was not unreasonable, then the plaintiffs cannot recover damages, or only nominal damages.

It is true that ordinarily a carrier has the right to fix the rates of carriage at such figure as will turn to his profit and increment. He may consider the difficulties of unloading at the port of discharge, the delays, the fact that the carrying vessel will have no return cargo, or that the shipper transports his goods by his line only occasionally, but, gentlemen, he has not the legal right to charge an unfair rate, one springing from a confederacy or combination by two or more carriers by which the trade will be monopolized and the field of transportation controlled by them, and by which the plaintiffs are charged a higher rate than other shippers, simply because they do not remain loyal, or refuse to continue to give their patronage to the combination.

It may well be that by the retention of the primage and agreement to repay it only in case the shipper keeps on patronizing the defendants' ships, a system was adopted which operated to coerce the plaintiff into giving such patronage, and prevented them from shipping by competing lines. This in my opinion would be a matter of discrimination not to be tolerated, in view of the statute which forbids and declares unlawful all combinations in restraint of trade. But, gentlemen, whether this operated to coerce the plaintiff to pay this primage, continuing to ship his commodities on the lines of the defendants' carriers, is a question of fact for your consideration.

The next item of damage in relation to which the plaintiffs have given testimony arises from the assertion that there were several instances when plaintiffs claim to have had opportunity to transact business to transport commodities to South African ports at a profit, but they say they were prevented from doing so, although they had opportunity of shipping it at a less price, namely by the Prince Line, and they omitted doing so for fear of losing the forfeit which they had paid, if they had patronized another shipping line. Now, I need not dwell on that fact in relation to this claim of damages. I have not the slightest doubt but that the facts are as clear in your mind as they are in mine. It is enough for me to say that the plaintiffs claim they did lose customers on one occasion, and as a result, \$450 in profit which they claim they would have made. Later on they claim to have lost \$1,300, and again, later on, they claim to have lost \$1,200.

Now, the plaintiffs, as I have already indicated to you, are re-

quired to show their losses, to prove their damages, beyond a reasonable doubt. The jury ought not to allow any speculative damages. You ought not to be required to guess as to what the damages are that the plaintiffs claim to have sustained. The burden of proof is upon them, and from the evidence you should be enabled to make a calculation of what their damages are. If not in the respect I have indicated, nothing should be allowed.

The third item of damages that arises from the lower rates which the Hansa line had established prior to joining the combination—plaintiffs claim they were coerced not to accept such rates and ship their goods by the Hansa line, and they claim that they failed to take advantage of this low rate of shipment because they had on deposit somewhere in the neighborhood of \$3,500 or \$4,000 with the defendants, and under this contract, to which I have already referred, they would have lost this 10 per cent. which they had paid on deposit with the defendants, and they claim that because they
283 were deprived of shipping their commodity to South Africa by this Hansa line, a competing line at the time, that they lost in the neighborhood of \$6,700. It remains for you to say whether they did or not. It remains for you to say whether the plaintiffs have by a fair preponderance of the evidence proved their loss in that regard.

Some evidence has been given which probably will cause you to ponder on the question as to whether you may find that the rate is unreasonable for a period of time and reasonable for another period of time. All of the facts you may take into consideration. You may find from the evidence that the rate was reasonable for a portion of this time and was unreasonable for another period of time.

If, on the other hand, as I have already indicated to you, you are satisfied from the consideration which you give to the evidence in this case that the rate was reasonable, that there was nothing unjust, that because the ships could not obtain the return cargo at South African ports that it was not an unreasonable exaction, that the shipper was confronted with loss on account of delay, and therefore they were justified in adding this additional per cent. to that rate, then your judgment should be for the defendants—no cause of action.

Mr. BAYNE: Well, I think your Honor has covered the ground. I except to your Honor's statement to the jury that the plaintiff must show "beyond a reasonable doubt."

The COURT: If I so stated, it was through inadvertence. I mean, the plaintiffs are required to make out their case and prove their damages by a fair preponderance of the evidence, and not beyond a reasonable doubt.

Mr. BAYNE: I ask your Honor to charge that a fair preponderance of the evidence does not mean a greater number of witnesses.

284 The COURT: No; such testimony as satisfies you of its credibility. Are there any requests by the defendants?

Mr. KIRLIN: If your Honor please, I desire to except to those parts of your charge in which you instructed the jury that all the defendants, including the agents, had in fact entered into a combination which was contrary to statute, and request that the question whether

they had actually entered into a combination unlawfully, within the definition of the Court, be left to the determination of the jury.

The COURT: I will deny that.

Exception by defendant.

Mr. KIRLIN: I except also, if your Honor please, to that part of the charge in which your Honor instructed the jury that plaintiffs might recover a certain amount against one or more of the defendants, and another or different amount against some of the other defendants, I understood your Honor to say. It is a little difficult for me to recall just what your Honor said about it. I also except to that part of the charge in which the jury are instructed that the defendants remaining in the case would be liable for acts done by those who have been dismissed from the case at the times subsequent to December, 1898, when the conspiracy is alleged to have been formed. And that exception also applies to the instruction that your Honor gave in respect to the liability of the remaining defendants for the acts of Hansa which are within that period.

I also except to that part of your Honor's charge in which the jury were instructed that the defendants remaining in the case are liable for the acts of those who have been dismissed, but who were not parties during the whole time of the conspiracy alleged.

285 I desire to except to that part of the charge in which your

Honor instructed the jury that as a matter of law the agents became parties to an unlawful conspiracy by what they did in connection with the business of the conference in New York.

I also desire to except specially to your Honor's leaving to the jury in any form the claim for \$6,700, representing what the plaintiffs think they might have made by shipping on the Hansa opposition, if the Hansa opposition had continued during the length of time, during the Hansa competition.

I understood I had your Honor's permission to ask one or two additional matters?

The COURT: Yes.

Mr. KIRLIN: I presume I may ask your Honor to allow me an exception to the refusal to charge specifically those requests that I have submitted. Your Honor has no doubt read those. I think your Honor has refused the most of them.

The COURT: The Circuit Court of Appeals held the other day, I have been told, that requests must be submitted in the presence of the jury.

Mr. KIRLIN: Yes, your Honor.

The COURT: You may read the requests.

Mr. KIRLIN: I have already excepted to the charge in the presence of the jury.

The COURT: You have an exception to all these rulings on the law that I have made.

Mr. KIRLIN: I will read the requests to your Honor.

"1. A verdict cannot be rendered in favor of the plaintiffs based upon no other injury than such as resulted from the contracts of shipment which the plaintiffs entered into with defendants at agreed rates and the payments made in accordance with such contracts."

The COURT: I will so charge.

Mr. BAYNE: But, if your Honor please, that absolutely restricts the damages to the primages.

286 Mr. KERLIN: Not at all. The primages were charged just as much as anything else.

The COURT: I will deny that.

Exception by defendant.

Mr. BAYNE: No. 2, I am willing to have denied.

Mr. THACHER: You are willing to have it denied?

Mr. KIRLIN (Reading): "2. A verdict cannot be rendered for the plaintiffs based upon no other loss to plaintiffs than such as resulted from contracts of shipment contained in the bills of lading entered into between the plaintiffs and defendants and payments made thereon."

The COURT: I will deny that.

Exception by defendant.

Mr. KIRLIN: No. 3. "There can be no verdict in favor of the plaintiffs unless you find that a payment of money was wrongfully induced by defendants."

The COURT: I will deny that.

Exception by defendant.

Mr. KIRLIN: No. 4. "There was nothing illegal or wrongful in the contracts of shipment contained in the bills of lading or in the receipt by the defendants from the plaintiffs of the freight and prime paid thereon or thereon agreed to be paid."

The COURT: I think I covered that. I will deny that.

Exception by defendant.

Mr. KIRLIN: No. 5. "It is essential to any recovery by plaintiffs on account of any loss caused to them by payments under contracts of shipment that it should appear that the rates charged were unreasonably high and in excess of what the service was worth, having regard to the right of the defendants to receive at least a fair profit."

287 The COURT: I think I charged that substantially. I will deny it.

Exception by defendant.

Mr. KIRLIN: No. 6. "If the case is defective as to furnishing you with data upon which to form a reasonable judgment upon any essential question, your verdict must be for the defendants."

The COURT: Oh, yes.

Mr. KIRLIN: Your Honor has already ruled upon the burden of proof. I will ask your Honor to charge specifically the one numbered 10.

"The firm of Barber & Company and the firm of Norton & Son are alleged to be among the parties who entered into such contract or agreement, and engaged in and formed such combination and conspiracy, prior to December in the year 1898. If you find that either Barber & Company or Norton & Son did not enter into such contract or agreement, or engage in and form such illegal combination and conspiracy at that time, your verdict must be for the defendants generally."

The COURT: I think I have covered that sufficiently. I will deny that.

Exception by defendant.

Mr. KIRLIN: No. 14. "If the jury consider that the failure of the plaintiffs to obtain the commissions of 10 per cent set out in the complaint, was an item of injury, the plaintiffs cannot recover unless they have shown that they would have been entitled to receive and retain those amounts, if collected. In determining that question, the jury must consider the admissions of Thomsen and Reidel that, during a considerable part of the time, beginning with the early part of 1900"—or whatever Thomsen and Reidel did say about that, as the jury may recall it.

288 The COURT: Yes, the jury may take into consideration the testimony of Mr. Thomsen as quoted by one of the witnesses on the stand.

Mr. BAYNE: I except.

Mr. KIRLIN: The 18th. That relates to that part of the commissions that are alleged to have accrued prior to the time of the incorporation of the Bucknall Company. "The plaintiffs claim the right to recover herein certain rebates enumerated in Plaintiffs' Exhibit A-2, on shipments made prior to November 15, 1900, aggregating £381:2:4 on steamers of which Norton & Son were agents, and aggregating £211:8:9 on steamers on which Barber & Co. were agents, amounting in the aggregate to £592:11:1. No part of this sum claimed as return commissions can be recovered against the defendants in this action."

The COURT: I will deny that.

Exception by defendant.

Mr. KIRLIN: No. 25. "If the jury should find that the plaintiffs are entitled to recover in this proceeding the commissions claimed by them, or such part of such commissions as fell due on shipments made in pursuance of a conference between all the defendants, then they should disallow any recovery in respect of the three orders referred to by the plaintiffs as having been received on July 19, and July 26, 1901, and July 10, 1902, for it would follow from such finding by the jury that the plaintiffs were not actually restrained by the circulars A and B from making the said three shipments for which they had orders, and any loss that they may have suffered in failing to fill such orders would be due to the plaintiffs' voluntary act, and not to any act of the defendants."

The COURT: I will deny that.

Exception by defendant.

289 Mr. KIRLIN: No. 27. "The undisputed evidence shows that all the shipments made by the plaintiffs that are related to this action were made under conditions determining the prepayment of the commissions to which the plaintiffs in each instance subscribed, and the benefits of which the plaintiffs enjoyed for an extended period of time. If the arrangement under which the commissions of 10 per cent were to be repaid was unlawful, the plaintiffs are barred by their participation in the arrangement from the

recovery of any sum withheld by the defendants or any of them according to the terms of that arrangement."

The COURT: I will deny that.

Exception by defendant.

Mr. KIRLIN: There were one or two things that occurred to me while my friend was summing up that I would like your Honor to cover. The first is, that unless the jury find from a preponderance of the proofs that the rates charged by the defendants to the plaintiffs, including the primage, were unreasonable or excessive, the plaintiffs have not been injured in the sense of the statute, and therefore would not be entitled to recover any verdict here against the defendants for substantial damage.

The COURT: Yes.

Mr. KIRLIN: I ask your Honor also to charge that the fact that the defendants were willing to return the 10 per cent to those who shipped exclusively by their lines, while it may be considered by the jury with the other evidence, is not conclusive evidence that the net rate without the primage was a remunerative rate, such as the defendants were entitled to receive, and that unless the preponderance of the proof shows that the net rate and the primage taken together constituted an excessive or unreasonable rate, the defendants are entitled to a verdict.

The COURT: Yes.

Mr. KIRLIN: And also that the burden of proof to show 290 that the rate was excessive and unreasonable was upon the plaintiff, and that it was not the burden of the defendants to prove that the rates were not excessive.

The COURT: I will deny that.

Exception by defendant.

The FOREMAN: May we have the figures that they claim. I haven't them in my mind—the three items.

The COURT: May they have the figures?

Mr. BAYNE: Yes, sir.

Juror No. 6: I would like to know if it is in the power of the jury, in considering the responsibility of these agents toward their principal, whether the disposition of this primage or 10 per cent entered into their liability in any way; what disposition was made of it; whether it was credited to them or actually passed to their credit.

The COURT: I charge that that is unimportant and immaterial.

Mr. BAYNE: It is a fact, but it is immaterial.

Mr. KIRLIN: The whole thing was remitted to London.

The COURT: There is some evidence that the agents conferred together in charging the rates, and not only that, but they pooled their commissions.

The jury retired.

Verdict.

For the plaintiff in the sum of \$5,600, with interest.

Mr. BAYNE: Interest—I do not know just what that means.

The FOREMAN: The jury could not fix the date because they did not know when this was due and payable.

Mr. BAYNE: It is a tort.

291 The COURT: Take the verdict without interest.

Mr. ULLO: Any action goes back to the date it was filed, therefore interest from the date of suit.

The FOREMAN: We believed they were entitled to interest, but could not give the date.

Mr. BAYNE: I would rather have the jury retire and give the fixed amount.

The COURT: You require interest from the time action was brought?

Mr. ULLO: I say as a matter of law the judgment goes back to the date of the filing of the complaint. It was brought June, 1903.

The FOREMAN: If your Honor please, some of these were not payable until a certain time afterwards, some six or nine months, and that left the jury very much in doubt when it was due.

The COURT: The plaintiffs claim they are entitled to recover interest from such time as you deem they were damaged, from the 9th day of June, 1903. What do you wish to do with reference to the claim of the plaintiffs in that regard?

The jury here deliberated among themselves and the foreman then stated: "We so find," or words to that effect.

Mr. KIRLIN: I would like to ask if it be made plain from the verdict that this is the amount allowed in respect to the 10 per cent commission?

The COURT: I won't require the jury to make any explanations.

Mr. BAYNE: I think we are entitled to have the jury find for a fixed amount.

The COURT: They have found for \$5,600, with interest from June 9th, 1903, the time in which you claim you are entitled to recover interest. The verdict will be multiplied by three as provided by the act.

Mr. KIRLIN: If your Honor please, before the jury retires, I desire to move for a new trial upon all the grounds stated in Section
292 999 of the Code of Civil Procedure, except that it is inadequate.

The COURT: I will deny the motion. I do not think there is any object in my going over it any more carefully than I have. The motion is denied.

Mr. KIRLIN: Exception by defendants.

Mr. KIRLIN: Your Honor, I am not clear in my mind whether at the end of the case when I asked your Honor to direct a verdict for the defendants I took an exception. I intended to and I think I did.

The COURT: You asked not only a direction in favor of the defendants, but specified the individuals, as I recollect.

Mr. KIRLIN: Did your Honor note my exception?

The COURT: You may have an exception.

Mr. KIRLIN: We will leave it to your Honor to fix the amount of counsel fee.

The COURT: I will make an allowance of \$2,500 counsel fee, in view of the services rendered by them. Are you sure I have a right to do it without proof?

Mr. ULLO: By consent. They may appeal from the question of the amount.

Mr. KIRLIN: Your Honor can fix the amount from your knowledge, without proof.

Mr. ULLO: You can except to the excessiveness or not, on appeal. We consent that your Honor fix it without formal proof. Whatever you fix in your own discretion.

The COURT: I will fix it at \$2,500, taking into consideration it is a second trial, and that the first trial was appealed to the Circuit Court of Appeals, and was there argued and reversed, and I think that \$1,000 for the services performed in preparing the papers and preparing for the first trial, taking the case to the Circuit Court of Appeals to be reasonable compensation, and that the additional sum of \$1,500 for trying the present case would not be unfair.

298 Mr. KIRLIN: Of course, it is understood our rights to raise all the questions are reserved without taking formal proofs?

The COURT: Surely. All your exceptions and all your rights to raise all the questions must be preserved.

Mr. KIRLIN: May I ask your Honor to grant us a stay?

The COURT: After entry of judgment?

Mr. KIRLIN: Our clients are perfectly good. We would like to get a stay of all proceedings.

The COURT: Do you consent to a stay of all proceedings?

Mr. BAYNE: For how long?

Mr. ULLO: Thirty days is as good as sixty.

Mr. KIRLIN: We cannot get anything up until fall.

Mr. ULLO: We shall do it by consent, but let the rule remain as it is.

Mr. THACHER: Sixty days; it ought to be ninety.

Mr. ULLO: Let it be sixty days.

The COURT: Granted.

The foregoing contains all the evidence taken on the trial.

And now, in furtherance of justice, and that right may be done, the defendants, Sir Charles W. Cayser, Charles W. Cayser, Jr. August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock, and John Percival, composing the firm of Cayser, Irvine & Co., Herbert Barber and James Barber, composing the firm of Barber & Co., Edward N. Norton and Skeffington S. Norton, composing the firm of Norton & Son, do tender and present the foregoing as their bill of exceptions in this case, to the action of the Court, and pray that the same may be settled and allowed and

signed and sealed by the Court and filed as a part of the record in this case nunc pro tunc, as of the 23rd day of April, 1909.

294 The foregoing is now hereby signed and sealed and directed to be filed as a part of the record in this case nunc pro tunc, as of the 23rd day of April, 1909.

JOHN R. HAZEL, *Trial Judge.*

It is agreed that the foregoing bill of exceptions is in the form in which it was finally settled by the Court.

ULLO, RUEBSAMEN & YUZZOLINO,
Plaintiffs' Attorneys.

CONVERS & KIRLIN,
Defendants' Attorneys.

(Endorsed:) United States Circuit Court, Southern District of New York. Hugo Adelberto Thomsen et al., Plaintiffs, against Union Castle Mail Steamship Company et al., Defendants. Bill of Exceptions. U. S. Circuit Court, Southern District N. Y. Filed Oct. 18, 1909, nunc pro tunc as of the 23rd day of April, 1909. John A. Shields, Clerk.

PLAINTIFF'S EXHIBIT A.

Thomsen & Co.,
July 25, 1902.
New York.

The South African Steam Lines.

Notice to Shippers in the United States.

Commission in Respect of Shipments by Steam and Sailing Vessels.

LONDON, 31st December 1898.

1. Shippers to all Ports of the Cape Colony and of Natal, and to Delagoa Bay, are hereby informed that until further notice,
295 and subject to the conditions and terms set out herein, each of the undernamed Lines will pay to Shippers by their Line a Commission of ten per cent, calculated upon the net amount of freight at tariff rates received by such Line from such Shippers on their shipments from the United States to South Africa.

2. The said Commission to be computed every six months up to the 31st January and 31st July in each year, and to be payable nine months after such respective dates to those shippers only who, until the date at which the Commission shall become payable, shall have shipped exclusively by vessels despatched by the undernamed Lines respectively from the United States to Ports of the Cape Colony, Natal, and Delagoa Bay, provided that such Shippers, either as Principals or as Agents, have not directly or indirectly made or been interested in any shipments to any of the aforesaid Ports by vessels other than those despatched by the undernamed, and also provided

that the Statement of Claim for such Commission shall be made in the annexed form, within twelve months of the date of shipment, to the Line which shall have carried the goods in respect of which the Commission is claimed.

3. The above Commission is not payable on the goods of any Consignee who directly or indirectly imports goods by vessels other than those despatched by the undernamed Lines.

AMERICAN AND AFRICAN STEAMSHIP LINE.
UNION CLAN LINE.

All previous Notices to Shippers or Consignees with reference to Returns on Freight are cancelled.

NOTE.—The above Commission will be payable to the Shippers whose names appear on the Bills of Lading, or to their Order.

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The South African Steam Lines.

Form for Statement of Claim for Commission in Respect of Shipments.

To ———,

———, 1890.

GENTLEMEN: I/we beg to hand you under [the]* noted list of my/our shipments by the vessels despatched by your Line during the six months ended ——— upon which shipments I/we claim for Commission referred to in the Notices to Shippers on the first page hereof dated 31st December, 1898, and such claim I/we make in accordance with, and on the terms and conditions of the said Notice, which I/we have received, and with which terms and conditions I/we have complied.

The following are the particulars of the above-mentioned shipments, and they are in accord with the Bills of Lading.

I/we remain, Gentlemen,

Yours truly,

———,
(Signature of Shipper.)

(Address) ———.

NOTE.—This declaration must be signed by a Partner of the firm claiming the Commission, or by some one holding the Firm's procuration.

Date of sailing.	Vessel.	Port.	Marks.	Net freight.	Amount of commission claimed.
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[*Word enclosed in brackets erased in copy.]

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PLAINTIFFS' EXHIBIT B.

The South African Steam Lines.

Notice to Shippers in the United States.

Commission in Respect of Shipments by Steam and Sailing Vessels.

LONDON, 1st November, 1901.

1. Shippers to all Ports of the Cape Colony and of Natal, and to Delagoa Bay, are hereby informed that until further notice, and subject to the conditions and terms set out herein, each of the under-named Companies will pay to Shippers by vessels despatched by them respectively a Commission of ten per cent, calculated upon the net amount of freight at tariff rates received by such Company from such Shippers on their shipments from the United States to South Africa.

2. The said Commission to be computed every six months up to the 31st January and 31st July in each year, and to be payable nine months after such respective dates to those Shippers only who, until the date at which the Commission shall become payable, shall have shipped exclusively by vessels despatched by the undernamed Companies respectively from the United States to Ports of the Cape Colony, Natal, and Delagoa Bay, provided that such Shippers, either as Principals or as Agents, have not directly or indirectly made or been interested in any shipments to any of the aforesaid Ports by vessels other than those despatched by the undernamed, and also provided that the Statement of Claim for such Commission shall be made in the annexed form, within twelve months of the date of shipment, to the Company which shall have carried the goods
298 in respect to which the Commission is claimed.

3. The above Commission is not payable on the goods of any Consignee who directly or indirectly imports goods by vessels other than those despatched by the undernamed Companies.

Donald Currie & Co., Bucknall Steamship Lines, Ltd., hitherto working as American and African Steamship Line. [Morton & Co.]*

Union-Castle Mail Steamship Co., Ltd., Cayzer, Irvine & Co., hitherto working as Union-Clan Line. [Barber & Co.]*

Hansa Steam Navigation Co. of Bremen. [Funk, Edye & Co.]*

This Notice is substituted for the Circular dated 31st December, 1898, for Shipments made from date thereof.

NOTE.—The above Commission will be payable to the shippers whose names appear on the Bills of Lading or to their order.

[*Words enclosed in brackets erased in copy.]

The South African Steam Lines.

Form of Statement of Claim for Commission in Respect of Shipments.

To Messrs. The Union-Castle Mail Steamship Company, Ltd., or Messrs. Donald Currie & Co. (as the case may be).

GENTLEMEN: I/we beg to hand you the undernoted list of my/our shipments by the vessels despatched by you during the six months ended — upon which shipments I/we claim the Commission referred to in the Notice to Shippers on the first page hereof dated 1st November, 1901, and such claim I/we make in accordance with and on the terms and conditions of the said Notice, which I/we have received, and with which terms and conditions I/we have complied.

The following are the particulars of the above-mentioned shipments, and they are in accord with the Bills of Lading.

I/we remain, Gentlemen,

Yours truly,

(Signature of Shipper.)

(Address) —.

Date of sailing.	Vessel.	Port.	Marks.	Net freight.	Amount of commission claimed.
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NOTE.—This declaration must be signed by a partner of the Firm claiming the Commission, or by someone holding the Firm's procuration.

FIRST PAGE, EXHIBIT E, JANUARY 14, 1907.

The South African Steam Lines.

Notice to Shippers in the United States.

Commission in Respect of Shipments by Steamers.

LONDON, 18th April, 1902.

1. Shippers to all Ports of the Cape Colony and of Natal, and to Delagoa Bay, are hereby informed that until further notice, and subject to the conditions and terms set out herein, each of the under-named Companies will pay to Shippers by Steamers despatched by them respectively a Commission of ten per cent., calculated upon the net amount of freight at tariff rates received by such Company from such Shippers on their shipments from the United States to South Africa.

2. The said Commission to be computed every six months up to the 31st January and 31st July each year, and to be payable six months after such respective dates to those shippers only who, until

the date at which the Commission shall become payable, shall have shipped exclusively by Steamers despatched by the undernamed Companies respectively from the United States to Ports of the Cape Colony, Natal and Delagoa Bay, provided that such Shippers, either as Principals or as Agents, have not directly or indirectly made or been interested in any shipments to any of the aforesaid Ports by Steamers other than those despatched by the undernamed, and also provided that the Statement of Claim for such Commission shall be made in the annexed form, within twelve months of the date of shipment, to the Company which shall have carried the goods in respect of which the Commission is claimed.

301 3. The above Commission is not payable on the goods of any Consignee who directly or indirectly imports goods by Steamers other than those despatched by the undernamed Companies:

Donald Currie & Co., Bucknall Steamship Lines, Ltd., hitherto working as American and African Steamship Line.

Union-Castle Mail Steamship Company, Ltd., Cayzer Irvine & Co., hitherto working as Union-Clan Line.

Hansa Steam Navigation Co. of Bremen.

This notice is substituted for the Circular dated 1st November, 1901, for shipments made from date hereof; and shipments made by Sailing Vessels after 1st February, 1902, will not prejudice claims to Commission.

NOTE.—The above Commission will be payable to the Shippers whose names appear on the Bills of Lading, or to their order. W. & S.

The South African Steam Lines.

Form of Statement of Claim for Commission in Respect of Shipments.

JANUARY 31st, 1903.

To Messrs. The Union-Castle Mail Steamship Company, Ltd., and Messrs. Donald Currie & Co.

GENTLEMEN: We beg to hand you the undernoted list of our shipments by the Steamers despatched by you during the six months ended January 31st, nineteen hundred and three, upon which shipments we claim the Commission referred to in the Notice to Shippers on the first page hereof dated 18th April, 1902, and such claim we make in accordance with and on the terms and conditions of the said notice which we have received and with which terms and conditions we have complied.

The following are the particulars of the above-mentioned shipments, and they are in accord with the Bills of Lading.

We remain, Gentlemen,

Yours truly,

(Signature of Shipper.)

(Address): 90-96 Wall St., City.

NOTE.—This declaration must be signed by a Partner of the Firm claiming the Commission, or by someone holding the Firm's procuration.

Date of sailing.	Vessel.	Port.	Marks.	Net freight.	Amount of commission claimed.
Sept. 12.	Queensland.	Capetown.	B. L. & Co. Ltd.	£2. 8.4	£0.4.10
"	"	"	W. S. & S.	1.19.9	0.4. 0
Nov. 23, X.	Winchester, X.	East London, X.	D. E. H. & Co., X.	11.10.2	X 1.3. 0
					£1.11.10
					E. & O. E.

(X.) Claim for item marked (X) has been sent on May 29th, 1903, to John Palmer, Jr., & Co. for collection.

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EXHIBIT CCC FOR IDENTIFICATION.

(Copy.)

Eastern D'p't. Pl'ffs' C. C. C.
Gen'l Agents for Norton Line
of Steamers. New York direct
to Montevideo, Buenos Aires
and Rosario.

Edward N. Norton,
Skeffington S. Norton.

H. A. T.
H. J. R.
Cable address
"Vernotch"
A 1 code
Watkins code

River Plate to New York via
Rio de Janerio and other
Brazilian Ports.

American & African Line. New
York to South and East Africa.

Norton & Son,
Steamship Agents & Brokers,
115 Produce Exchange,

American & Australian Line.
New York direct to Australa-
sian ports.

Bucknall Steamship Lines, Ltd.
(American & Indian Line)
New York (via Suez Canal),
to Aden, Bombay, Calcutta,
etc., India to New York.

(British & Colonial Line.) Lon-
don direct to South & East
African ports.

NEW YORK, Oct. 30, 1901.

Messrs. Thomsen & Co., New York City.

DEAR SIR: We are in receipt of your favor of the 29th inst., and contents has our careful attention.

As regards Deferred Rebates—American & African Steamship Line—we would state that we have advices from our Principals to intimate to you and all other shippers, that from the present
 304 time, bookings by the Hansa Line will not jeopardise deferred rebates.

Your truly,
 (Sgd.)

NORTON & SON,
Agts. A. & Aus. S. S. Line.

EXHIBIT 1.

Eastern Dept.

H. A. T.
 H. J. R.

The Union-Castle Mail Steamship Company, Limited.
 Donald Currie & Co., Managers.

Telegraph Address, Doncurco, London.
 Telephone: Nos. 2415 and 2417 Avenue.

3 FENCHURCH STREET,
 LONDON, 23rd Nov., 1900.

Messrs. Thomsen & Co., 106 Wall Street, New York.

DEAR SIR: We are favored by your letter of the 14th inst. covering copy of a communication which you had addressed to our Agents Messrs. Barber & Co., who have also furnished us with a copy.

In reply we have to express our regret that any of the items connected with the shipments of Messrs. Walter Searle & Son should have been erased from your rebate claim, and we are instructing our Agents by this mail to pay for these items amounting to £12.3.9.

Of course we were unable to tell, owing to the marks being
 305 identical, whether the goods belonged to the firm named or to Messrs. W. Savage & Son, and it would probably save anything of the kind happening in the future if you were to disclose the names of the consignees.

As regards the other items which were struck out of your claim, we must travers your statement that in including these you were "only strictly adhering to the terms of your own notice dated London, 1st December, 1898." If you refer to that notice again you will find it distinctly says:

"The said commission to be computed every six months up to the 31st January and 31st July in each year, and to be payable nine months after such respective dates to those shippers only who until the date at which the commission shall become payable shall have shipped exclusively," etc., etc.

Your clients admittedly shipped by sailers between the 31st January the closing date of your rebate claim, and the date when it fell due for payment (November), and therefore forfeited the rebate.

While we are free to admit that your good selves are loyally disposed towards the lines, it cannot be denied that certain of your

clients are not so, and naturally we cannot agree to those clients receiving the advantages of the rebate system while systematically supporting opposition vessels.

Yours faithfully,

For UNION CLAN LINE,
CAMPBELL CORKE.

(Endorsed:) London, 1900, Nov. 23, Union Clan, Recd. Dec. 3,
Ans'd Dec. 14, 1900.—S. Eastern Dept.

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EXHIBIT 1.

Eastern Dep't.

H. A. T.
H. J. R.

Union Clan Line.

Regular Steamship Service United States to South Africa.

The Union Castle Mail Steamship Co., Limited.

3 Fenchurch Street, 96 Bishopsgate St., London, E. C.

Telegraphic Address, Doncurco, London.

LONDON, E. C., 31st Oct., 1900.

Messrs. Thomsen & Co., 106 Wall Street, New York.

DEAR SIRS: We are favored by your letter of the 19th inst., and in reply we regret that you should feel that you have any cause for complaint, but we consider that the question of these sailing vessel shipments has not been clearly put before the Lines. When permission was asked by your good selves and other firms to ship by sailer without being penalized so far as rebates were concerned we were not aware that you had received positive instructions from your principals to ship by sail, and were under the impression that you were acting on your own initiative in desiring to avail yourselves of Messrs. Crossman sailer, otherwise we should have stated, what we have now cabled to our agents, that we shall penalize only those marks which are shipped by sail. Of course, where commission houses go out of their way to put on sailing vessels in opposition to the Lines we shall refuse to pay them any rebate at all, and leave their loyal clients to claim the rebate. The fact that your

307 rebate claim for the period ended 31st January last has been out down from £450 to under £200 through the elimination of marks of disloyal consignees should we think bring home to them the disadvantages attending their support of outside vessels.

Yours faithfully,

For UNION CLAN LINE,
CAMPBELL CORKE.

(Endorsed:) London, 1900, Oct. 31, Union Clan Line, Recd.
Nov. 10, Ans'd Nov. 14, 1900. S. Eastern Dept.

EXHIBIT 1.

New York—South African Trade.

Conference Sailings.

Steamer.	Left New York.	Steamer.	Left New York.
	1899.		1899.
Dunblane	8th Jan.	Norge	16 June
Anna Moore	9 "	Anglo Australian	21 "
Borderer	19 "	Sabine	7 July
Clematis	20 "	Dunblane	12 "
Shathord	21 "	Bechuana	16 "
St. Giles	3 Feb.	Auchenarden	1 Aug.
Britannia	4 "	Susquehanna	8 "
Bucentaur	17 "	Clematis	13 "
Sandusky	21 "	Maria	28 "
Fernfield	26 "	Border Knight	6 Sept.
Sabine	8 Mar.	Kunachee	19 "
Ballazan	27 "	Agapanthus	29 "
Buceros	1 Apr.	Clan Robertson	8 Oct.
Susquehanna	5 "	Beatrice	16 "
Comeric	22 "	Clan Monroe	1 Nov.
Anglo Chilean	30 "	Mashona	3 "
Pondo	2 May	Clan Cumming	23 "
Caspian	14 "	Susquehanna	3 Dec.
Mashona	21 "	Buceros	22 "
St. Giles	23 "	Bechuana	22 "
Westburn	2 June		

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	(41)	1900.		1901.
Sabine	4 Jan.	Clan Colquhoun	10 Mar.	
Auchenarden	11 "	Sabine	24 "	
Laureldene	24 "	Lord Antrim	7 April	
Powderham	28 "	Inchmorla	17 "	
St. Dunstan	9 Feb.	Inchuha	28 "	
Bucentaur	12 "	Indianie	13 May	
Border Knight	8 March	Buceros	15 "	
Victoria	13 "	Hackney	13 June	
Kunachee	1 April	York Castle	25 "	
Maria	1 "	Wynerie	9 July	
Inchuha	13 "	Gordon Castle	18 "	
Sandsend	1 May	Trojan	28 "	
Susquehanna	20 "	Sabine	15 Aug.	
Inchmaree	3 June	Ledonia	23 "	
Claudins	14 "	Glanysbryth	22 Sept.	
Buceros	30 "	Inchuha	6 Oct.	
St. Dunstan	6 July	Inchmorla	16 "	
Inchmorla	26 "	Susquehanna	20 "	
Clan Cumming	8 Aug.	Hilltarn	12 Nov.	
Border Knight	10 "	Croydon	25 "	
Fridtjof Nansen	25 "	Bath	1 Dec.	
Kiana	10 Sept.	Sabine	20 "	
Dunblane	20 "			
Maristow	27 "			
Begonia	15 Oct.			
Sandsend	28 "			

(29)

1902.

Clan McMillan	10 Jan.
Gordon Castle	12 "
Manica	28 "

Conference Sailings.

Steamer.	Left New York.	Steamer.	Left New York.
Inchuha.....	3 Nov.	Aros Castle.....	9 Feb.
Lord Antrim.....	3 "	York Castle.....	21 "
Clan Urquhart.....	14 "	Neuenfels.....	6 Mar.
Inchmialo.....	29 "	Bucenteur.....	9 "
Cyneric.....	13 Dec.	Clan McGregor.....	2 Apl.
Kunachee.....	21 "	Corfe Castle.....	5 "
Trojan.....	25 "	Susquehanna.....	5 "
Isel Holme.....	29 "	Clan McMillan.....	26 "
(34)	1901.	Sabine.....	17 May
Clan Farquhar.....	20 Jan.	Gordon Castle.....	17 "
Zinnia.....	24 "	Baralong.....	23 May
Begonia.....	30 "	Schwarzenfels.....	11 June
Inchmarce.....	6 Feb.	York Castle.....	24 "
Ellerie.....	16 "	Hilltarn.....	29 "
Maristow.....	23 "	Neuenfels.....	11 July
Dunblane.....	26 "	Aros Castle.....	10 "
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	1902.		1903.
Anglo-African.....	2 Aug.	British Monarch.....	6 April
Clan Colquhoun.....	3 "	Bernicia.....	5 "
Swazi.....	3 "	York Castle.....	21 "
Corfe Castle.....	15 "	Lowenberg.....	22 "
Burotse.....	24 "	Nithsdale.....	23 "
Clan McMillan.....	12 Sept.	Gordon Castle.....	3 May
Gordon Castle.....	13 "	Sabine.....	7 "
Queensland.....	12 "	Bucrania.....	15 "
Arara.....	24 "	Hindustan.....	18 "
Schwarzenfels.....	1 Oct.	Gibraltar.....	24 "
Susquehanna.....	12 "	Anapa.....	25 "
Mashona.....	23 "	Ormley.....	5 June
Hilltarn.....	20 "	Swazi.....	17 "
Clan Ferguson.....	25 "	Aros Castle.....	17 "
Hourick Hall.....	3 Nov.	Corfe Castle.....	22 "
Aros Castle.....	14 "	Griqua.....	20 "
Sabine.....	16 "	Claverley.....	1 July
Winchester X.....	23 "	Monica.....	14 "
Beechley.....	19 "	Ripley.....	18 "
St. Kilder.....	6 Dec.	Susquehanna.....	21 "
Venetia.....	9 "	Hohenfels.....	28 "
Abana.....	9 "	Buceros.....	12 Aug.
Lindenfels.....	15 "	York Castle.....	16 "
Heatheraig.....	20 "	Daghestan.....	16 "
Bechuana.....	23 "	Gordon Castle.....	27 "
Corfe Castle.....	31 "	Sabine.....	2 Sept.
(45)	1903.	Dovedale.....	13 "
Wildenfels.....	2 Jan.	Florida.....	30 "
Valetta.....	12 "	Aros Castle.....	3 Oct.
Manica.....	21 "	Tannenfels.....	11 "
Gordon Castle.....	25 "	Corfe Castle.....	24 "
Imogen.....	6 Feb.	New Orleans.....	29 "
Susquehanna.....	7 "	Susquehanna.....	29 "
Queen Olga.....	12 "	Corn Exchange.....	5 Nov.
Osborne.....	14 "	Reigate.....	19 "
Barotse.....	26 "	Hindustan.....	22 "
Schanfels.....	2 Mar.	York Castle.....	25 "

Conference Sailings.

Steamer.	Left New York.	Steamer.	Left New York.
Heathbank	3 "	Reichenfels.....	6 Dec.
Aros Castle.....	10 "	Gordon Castle.....	15 "
Titania	18 "	Sabine	24 "
Briardale	25 "	(55)	
Queen Louise.....	25 "		

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	1904.
Swazi.....	1 Jan.
Amara	11 "
Leitrim	15 "
Marienfels	27 "
Aros Castle.....	7 Feb.
Corfe Castle.....	14 "
Manica	19 "
Susquehanna	21 "
York Castle.....	16 Mar.
Daghestan	17 "
Lichtenfels	6 April
Gordon Castle	16 "
British Monarch.....	16 "
St. George.....	5 May
Griqua	15 "
Gloamin	21 "
Sabine.....	14 June
Aros Castle.....	21 "
Swazi.....	1 July
Susquehanna	9 "
Jessie Burns.....	27 "
Gordon Castle.....	28 "
Bantu.....	12 Aug.
Schonfels	29 "
York Castle.....	17 Sept.
Clan McMillan.....	4 Oct.
Daghestan	9 "
Sabine	23 "
Hypatia.....	6 Nov.
Corfe Castle.....	26 "
Bucrania	25 December

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	1901.
Neidenfels.....	15 June
Argenfels.....	21 July
Hohenfels.....	8 Sept.
Nordykn.....	29 Oct.
(4)	
Norman Prince.....	18 June
Tartar Prince.....	23 July
Hyanthes.....	9 Aug.
Spartan Prince.....	15 "
Hilarius	25 "
Saxon Prince.....	15 Sept.
Regement Castle.....	30 "
Norman Prince.....	22 Oct.
Westminster.....	9 Nov.
Tartar Prince.....	10 "

	1904.
Afghanistan	28 December
(32)	
Mashona.....	13 Jan.
Aros Castle.....	22 "
Gordon Castle.....	3 Feb.
Schazfels.....	2 Mar.
Buenos	26 "
Susquehanna	27 "
Clan McMillan.....	16 April
Sabine	24 "
Amatonga.....	3 May
Moltkefels	14 "
Rass Issa.....	23 "
Corfe Castle.....	6 June
Kybfels	23 "
Dovedale.....	2 July
Griqua	16 "
Clan McLachlan.....	28 "
Gordon Castle.....	5 Aug.
Aros Castle.....	20 "
Buceros.....	1 Sept.
Tudor Prince.....	16 "
York Castle.....	1 Oct.
Susquehanna	13 "
Clan McMillan.....	4 Nov.
Black Prince.....	12 "
Trifels.....	6 Dec.
Daghestan	10 "
Welsh Prince.....	21 "
Mashona	31 "
(28)	

	1903.
Saxon Prince.....	11 Aug.
Ras Elba.....	14 "
Tudor Prince.....	17 Sept.
Glenesk	26 "
Fernley.....	10 Nov.
Welsh Prince.....	11 "
Gairlock.....	15 Dec.
African Prince.....	17 "
(22)	
Auchenblas.....	14 Jan.
Kurdistan	29 "
Norman Prince.....	30 "
Tudor Prince.....	15 Feb.
Afghan Prince.....	2 Mar.
Black Prince.....	27 "

Conference Sailings.

Steamer.	Left New York.	Steamer.	Left New York.
Jumna.....	3 Dec.	Vortigern.....	6 Apl.
Heathglan.....	10 "	Welsh Prince.....	1 May
(12)	1903.	African Prince.....	25 "
Saxon Prince.....	4 Jan.	Crown Prince.....	19 June
Heathburn.....	8 "	Saxon Prince.....	12 July
Milton.....	10 Feb.	Norman Prince.....	12 "
Clematis.....	19 "	Tudor Prince.....	10 Sept.
Tudor Prince.....	6 Mar.	Black Prince.....	10 Oct.
Farnham.....	15 "	Italian Prince.....	2 Nov.
Norman Prince.....	23 "	Egyptian Prince.....	7 Dec.
Croydon.....	22 Apl.	(16)	1905.
Riverdale.....	5 May	Norman Prince.....	8 Jan.
St. Quentin.....	14 "	Tudor Prince.....	1 Mar.
African Prince.....	10 June	Black Prince.....	1 Apl.
Roseley.....	18 "	Italian Prince.....	3 May
Eidsvold.....	3 July	Welsh Prince.....	18 June
Rhodesian.....	18 July	(5)	

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SUMMARY.

American Sailings.

	Conference steamers.	Opposition steamers.	Sailing vessels.
1893.....	9	.....	1
1894.....	12	.....	17
1895.....	17	.....	22
1896.....	37	.....	39
1897.....	31	.....	42
1898.....	40	8 Askell Douglas.....	6
1899.....	41	.....	1
1900.....	34	.....	5
1901.....	29	4 Houses.....	6
1902.....	45	12 Prince Houston.....	9
1903.....	55	22 Do.....	
1904.....	32	16 Prince.....	
1905.....	28	5 Do.....	

(Endorsed:) Thomsen & Co. v. Union Castle Co. and others.—
Table of Conference Sailings and Opposition Sailings referred to in
paragraph 13 of Memorandum of 5th December, 1906.—Parker
Garrett Holman & Howden, St. Michael's Rectory, Cornhill E. C.

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PLAINTIFFS' EXHIBIT A 2.

Copy.

United States Circuit Court, Southern District of New York.

HUGO ADELBERTO THOMSEN and Others

vs.

UNION CASTLE MAIL STEAMSHIP Co., LTD., et al.

It is agreed that the annexed statement correctly shows the net freight, the amounts charged as primage, expressed in sterling, the total charge expressed in United States currency and the rate of exchange on the enumerated shipments which were made by the plaintiffs at the times specified by steamers whose agents are mentioned in the statement.

ULLO, RUEBSAMEN & YUZZOLINO,

Att'ys for Pl'ffs.

CONVERS & KIRLIN,

Att'ys for Def'ts.

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Norton & Sons, Agents.

Exchange.	Total U. S.	Net freight.	Date of B/L. 1899.	Steamer.	Port.	Mark.	Primage.
4.87	134.53	25-2-3	15	Comerie.....	Port Elisabeth.....	S. F. & C.....	23.10.3
.87	107.63	20-1-10	Apr. 15	"	"	H. & V.....	2.0.2
.87	134.53	25-2-3	15	"	"	G. & C.....	2.10.3
.87	134.53	25-2-3	" 15	"	"	L. B. & C.....	2.10.3
.87	100.44	18-15-0	" 15	"	"	L. B. & C.....	1.17.6
.89½	81.86	15-4-8	July 6th	Bechuana.....	"	do.	1.10.6
Total to May 1st, 1900.....							\$19.16.11
.88	215.12	40-1-3	Aug. 7th	Clematis.....	Algoa Bay.....	S. F. & C.....	4.0.1
.88	203.88	37-10-8	" 7th	"	"	L. B. & C.....	3.15.11
.86½	169.99	31-15-4	Oct. 11th	Beatrice.....	"	H. L. & C.....	3.3.6
.86½	187.50	35-0-9	" 11th	"	"	D. S. & C.....	3.10.1
.87½	130.91	24-8-3	" 18th	Mashona.....	"	L. B. & C.....	2.8.10
.87½	201.10	37-10-0	" 20th	"	"	S. F. & C.....	3.15.0
.87½	981.18	182-19-5	" 20th	"	"	do.	18.5.11
.87½	170.34	31-15-4	" 24th	"	"	L. B. & C.....	3.3.6
.87½	243.69	45-8-10	" 24th	"	"	D. S. & C.....	4.10.11
.87½	657.96	122-13-11	" 25th	"	"	L. B. & C.....	12.5.5
.87½	657.96	122-13-11	" 25th	"	"	S. F. & C.....	12.5.5
.87½	988	184-4-10	" 26th	"	"	H. & V.....	18.8.6
Total to May 1st, 1900.....							\$19.16.11

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.87½	1,308.18	243-10-0	Dec. 12th	Buenos.....	"	B. P.	24.7.11
.87½	703.82	131-5-0	" 12th	"	"	S. F. & C.....	13.2.6
.87½	466.23	87-10-0	" 13th	"	"	D. S. & C.....	8.15.0
.87½	439.88	82-0-7	" 13th	"	"	W. S. & S.....	8.4.1
.87½	334.28	62-6-9	" 19th	"	"	S. F. & C.....	6.4.8
.87½	186.08	34-14-0	" 19th	"	"	do.	3.9.5

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Norton & Sons, Agents—(Continued).

Exchange.	Total - U. S.	Net freight.	Date of B/L, 1901.	Steamer.	Port.	Mark.	Primage.
.83½	749.36	130-9-1	Aug. 14	Lodovica.....	"	J. B.	£13.18.11
.83½	134.89	23-4-10	"	"	"	"	2-6-6
.87½	373.80	69-14-6	Jan. 24, 1902	Manica.....	"	"	6.19.5
.87½	373.80	69-14-6	"	"	"	"	6.19.5
.87½	849.33	46-9-3	"	"	"	"	4.13.0
Total May 1, 1902 to Nov. 1, 1902.....							34.17.3
4.88	2,479.40	461-17-9	March 1st	Bucentaur.....	East London.....	K. S. M.	246.3.9
.88	374.77	69-14-6	"	"	"	J. B.	23.19.5
.88	374.37	69-14-6	"	"	"	J. B.	6.19.5
.88	4.98	0-18-7	"	"	"	"	0.1.10
.83½	282.01	71-1-10	May 7th,	Sabine.....	"	"	7.2.2
.83½	229.21	43-13-1	"	"	"	"	4.5.4
.83½	7.63	1-8-5	"	"	"	"	0.2.10
.83½	222.67	41-8-9	"	"	"	"	4.2.11
.83½	183.09	35-0-1	"	"	"	"	8.10.0
.83½	152.83	28-8-9	"	"	"	"	2.16.11
.83½	1,902.47	264-0-11	"	"	"	"	35.8.1
							£117.12.8
							£372.15.6

Exchange.	Total U. S.	Net freight.	Date of B/L. 1899.	Steamer.	Port.	Mark.	Primage.
4.87½	134.66	25-2-3	May 10	Caspian	Port Elizabeth	S. F. & C.	23.10.3
	217.85	40-12-6	May 11	"	"	L. B. & Co.	4.1.3
4.87	200.89	37-10-0	" 24	St. Giles	"	do.	3.15.0
	300.89	37-10-0	" 24	"	"	D. S. & C.	3.15.0
4.83	430.47	78-6-7	July 6	Sabine	"	L. B. & Co.	7.10.8
Total to May 1st, 1900.							231.18.2
4.83	217.05	40-10-11	" 27	Archenarden	"	L. B. & C.	4.1.1
4.83	429.28	79-19-5	" 27	"	"	S. F. & C.	7.19.11
87½	134.72	25-2-5	" 31	Susquehanna	"	W. P. & C.	2.10.3
86	218.61	69-11-7	Aug. 14	Border Knight	"	S. F. & C.	5.19.2
86	200.43	37-10-0	" 31	"	"	L. B. & C.	3.15.0
86	200.43	37-10-0	" 22	"	"	H. L. & C.	3.15.0
86	603.94	112-19-5	" 29	"	"	S. F. & C.	11.5.11
86	200.43	37-10-0	" 29	"	"	P. B.	3.15.0
86½	602.04	112-10-0	" 14	Kurrachee	"	D. S. & C.	11.5.0
86½	139.75	26-2-3	" 14	"	"	L. B. & C.	2.12.3
86½	409.23	76-11-2	" 19	"	"	P. B.	7.13.2
86½	402.40	75-2-10	" 19	"	"	W. S. & S.	7.10.5
86	522.70	110-17-4	" 23	Clan Robertson	"	L. B. & C.	11.1.9
86	201.27	37-13-4	" 23	"	"	S. F. & Co.	3.15.4
86	200.43	37-10-0	" 30	"	"	do.	3.15.0

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Barber & Co., Agents—(Continued).

Exchange.	Total U. S.	Net freight.	Date of B/L. 1899.	Steamer.	Port.	Mark.	Primage.
.86	200.48	37-10-0	" 30	"	"	H. L. & C.	3.15. 0
.86	300.71	56- 5-0	" 30	"	"	L. B. & C.	5.12. 6
.86	385.66	72-2-10	" 28	"	"	D. S. & C.	7. 4. 3
.86	242.41	45- 6-11	" 28	"	"	H. L. & C.	4.10. 8
.86	242.41	45- 6-11	" 28	"	"	L. B. & C.	4.10. 8
.86	68.77	12-17- 3	Oct. 5	"	"	L. B. & C.	1. 5. 9
.87	482.33	90- 0- 9	Nov. 17	Cumming.	"	S. F. & C.	9. 0. 1
.87	1,316.10	245-13- 7	" 17	"	"	G. & C.	24.11. 4
.87	658.02	122-16- 8	" 17	"	"	S. F. & C.	12. 5. 8
.87	130.80	24- 8- 4	" 20	"	"	L. B. & C.	2. 8.10
.87	130.80	24- 8- 4	" 18	"	"	D. S. & C.	2. 8.10
.87	1,021.44	180-13- 5	" 19	"	"	S. F. & C.	19. 1. 5
.87	532.13	99- 5- 8	" 21	"	"	do.	9.18. 8
.86	495.90	92-15- 3	" 24	Susquehanna.	"	L. B. & C.	9. 5. 6
.86	397.41	74- 0- 9	" 28	"	"	S. F. & C.	7. 8. 8
.86	30.78	3-17- 9	" 30	"	"	L. B. & C.	0. 7. 9
.86	428.25	80- 2- 1	" 29	"	"	do.	8. 0. 3
.86	664.53	124- 6- 1	" 28	"	"	S. F. & C.	12. 8. 7
.87½	698.45	128- 7- 8	Dec. 28	Sabine.	"	do.	12.16. 9
.87½	255.59	47-13- 3	1900. Jan. 4	"	"	do.	4.15. 4
Total May 1, 1900 to Nov. 1, 1900							252.10. 0

319

.83	469.70	87-10- 0	May 14	Susquehanna.	"	D. S. & C.	8.15. 0
.83	982.00	182-18- 9	" 16	"	"	G. & C.	18. 5.10
.87	147.33	27-10- 0	June 7	Claudius.	"	do.	2.15. 0
.87	202.29	37-15- 3	" 11	"	"	D. S. & C.	3.15. 6
Total Nov. 1st, 1900 to May 1st, 1901.							33.11. 4

.87	305.53	38-10-9	July 19	Clan Cumming....	"	G. & C.....	3.17. 1
.87	388.63	72-10-11	" 26	"	"	do.....	7. 5. 1
.87	401.77	76-0-0	" 31	"	"	S. F. & C.....	7.10. 0
.87½	93.33	17-8-1	Aug. 18	Fritidjof Nansen..	"	G. & C.....	1.14.10
.87½	348.56	66-0-0	" 18	"	"	do.....	6.10. 0
.87	449.22	83-17-1	Sept. 24	Maristow.....	"	S. F. & C.....	8. 7. 9
.87	256.69	47-18-4	" 24	"	"	D. S. & C.....	4.16.10
.84	1,091.12	204-18-10	Nov. 8	Clan Urquhart....	"	G. & C.....	20. 9.11
.84	223.23	41-18-7	" 12	"	"	S. F. & C.....	4. 3.10
.84	446.47	83-17-2	" 12	"	"	D. S. & C.....	8. 7. 9
.87½	915.63	170-14-11	1901. Jan. 31	Elleric.....	"	G. & C.....	17. 1. 6
				Total May 1st, 1901 to Nov. 1st, 1901.....			90. 3. 7
.85½	2,546.67	476-17-2	1902. Sept. 30	Susquehanna.....	East London.....	K. S. M. D.	
				Total Nov. 1st, 1901, to Nov. 1st, 1902.....			47.13. 9
							<u>£445.17. 7</u>
.88	3,902.39	726-19-6	March 26	Susquehanna.....	East London.....	K. S. M.	72.13.11
.88	190.81	35-10-11	" 26	"	"	J. B.	3.11. 1
.88	190.81	35-10-11	" 26	"	"	J. B.	3.11. 1
							<u>£79.16. 1</u>

Statement of Primage Rebates.

Funch, Edye & Co., Agents.

Exchange.	Total U. S.	Net freight.	Date of B/L.	Steamer.	Port.	Mark.	Primage.
			1902.				
4.87½	\$113.81	21-4-6	Feb. 18th	Neuenfels.....	Cape Town.....	E. R. A. T16.....	£2. 2. 5
.87½	14.30	2-12-11	" 19th	"	"	" T17.....	0. 5. 4
.87½	231.30	43-2-8	" 19th	"	"	B. L. & Co. Ltd.	
.87½	1,597.52	297-12-1	Mar. 3rd	"	Port Elizabeth....	P. & Co. ¼.....	4. 6. 3
.87½	199.77	37-5-1	" 3rd	"	"	do. 5.....	29.15.10
.87½	5.40	1-0-2	Feb. 26th	"	Algoa Bay.....	E. R. P.	3.14. 6
.87½	12.41	2-6-3	June 4th	Schwarzenfels....	Cape Town.....	G. T.	0. 2. 0
.87½	1,322.57	257-16-5	" 7th	"	"	E. R. A.....	0. 4. 8
.87½	27.60	5-2-11	" 7th	"	"	D. L. & Co. Ltd.....	25.15. 8
.87½	240.21	44-16-0	" 10th	"	"	do.	0.10. 4
.87½	165.71	30-18-0	" 10th	"	"	do.	4. 9. 7
.87½	31.18	5-16-3	" 6th	"	"	do.	3. 1.10
.88	331.64	71-1-11	" 23rd	Neuenfels.....	East London.....	E. R. A.....	0.11. 8
.88	81.68	15-3-11	" 21st	"	"	J. R.	7. 2. 2
						J. M.	
.88	208.92	38-18-5	" 24th	"	"	G.	1.10. 5
.88	40.76	7-11-11	July 1st	"	"	D. E. H. & Co.....	3.17.10
						J. M.	
.88	50.12	11-4-0	" 7th	"	"	G.	0.15. 2
						"	1. 2. 5
							£20. 8. 1

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PLAINTIFFS' EXHIBIT A-3.

Difference Between Rates of Shipments Actually Made and Rates Available from Hansa Line.

1901.

June 19	4,000 cases Oil to per York Castle.		
	Paid @ 32/6 plus 10% =	\$1,600.86	
	Hansa offered 20/- =	891.14	
			\$709.72
June 15	40 cases Sundries, per York Castle.		
	Paid @ 45/- & 55/-	\$11.56	
	Hansa rate @ 30/-	7.26	
			\$4.30
June 20	680 cases Gen. Mehdsae, per York Castle.		
	Paid @ 45/-	\$220.39	
	Hansa's rate @ 30/-	133.04	
			\$87.35
June 24	322 pkgs. Gen. Mehdsae by York Castle.		
	Paid @ 42/6 & 45/-	\$265.40	
	Hansa's rate 30/-	161.35	
			\$104.05
July 5	3,000 cases Oil, per Wyneric.		
	Paid @ 20/- plus 10%	\$738.86	
	Hansa's rate @ 17/6	584.72	
			\$154.14
July 5	500 cases Oil, per Wyneric.		
	Paid @ 20/- plus 10%	\$134.34	
	Hansa's Rate @ 17/6	106.31	
			\$28.03
July 6	79 cases on Gen. Mehdsae, per Gordon Castle.		
	Paid @ 45/- & 42/6, plus 10%	\$217.74	
	Hansa's Rate @ 30/-	136.60	
			\$180.14
July 9th	5,000 cases Oil per Gordon Castle.		
	Paid @ 32/6, plus 10%	\$2,001.07	
	Hansa's Rate @ 17/6	974.55	
			\$1,026.52
July 15	24 pkgs. Gen. Mehdsae e- Gordon Castle.		
	Paid @ 42/6, 45/ & 55/ plus 10%	\$59.33	
	Hansa's rate @ 40/-	47.75	
			\$11.58
July 10	10 cases Gen. Mehdsae, per Gordon Castle.		
	Paid @ 45/-	\$22.67	
	Hansa's — 30/-	15.11	
			7.56
July 17	965 pkgs. lumber, per Gordon Castle (and windows).		
	Paid @ 30/-, 36/3, 42/6 plus 10%	\$322.83	
	Hansa's rate 30/-	285.23	
			\$37.60

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1901.

July 16	1,000 sacks Flour per Gordon Castle.		
	Paid @ 37/6, plus 10%	\$440.79	
	Hansa's rate @ 20/-	212.63	
			\$228.16
July 16	750 sacks Flour per Gordon Castle.		
	Paid @ 37/6 plus 10%	\$330.60	
	Hansa's rate @ 20/-	159.53	
			\$171.07

July 16	220 cases Gen. Mehdse, per Gordon Castle.		
	Paid @ 45/- plus 10%.....	\$72.54	
	Hansa's rate 30/-.....	43.74	
			\$28.80
July 24	3,000 cases Oil, per Trojan.		
	Paid @ 27/6 plus 10%.....	\$1,013.86	
	Hansa's rate @ 17/6.....	584.78	
			\$429.08
Aug. 5	1,000 cases Oil per Sabine.		
	Paid @ 32/6 plus 10%.....	\$399.39	
	Hansa's rate @ 17/6.....	194.96	
			\$204.43
Aug. 5	4,000 cases Oil per Sabine.		
	Paid @ 32/6 plus 10%.....	\$1,597.58	
	Hansa's rate @ 17/6.....	780.44	
			\$817.14
Aug. 8	575 cases Gen. Mehdse per Sabine.		
	Paid @ 45/- plus 10%.....	\$223.70	
	Hansa's rate 30/-.....	135.23	
			\$88.47
Aug. 15	275 cases Gen. Mehdse, per Sabine.		
	Paid @ 45/- plus 10%.....	\$285.31	
	Hansa's rate @ 30/-.....	172.41	
			\$112.90
Aug. 15	40 cases Gen. Mehdse, per Sabine.		
	Paid @ 45/- plus 10%.....	\$42.21	
	Hansa's rate @ 30/-.....	25.52	
			\$16.69
Aug. 14	2,090 bags Wheat, per Lodovica.		
	Paid @ 42/6 plus 10%.....	\$2,476.00	
	Hansa's rate, per Arginfels 16/6.....	922.10	
			\$1,553.90
Aug. 14	1,500 sacks flour, per Lodovica.		
	Paid @ 42/6 plus 10%.....	\$749.36	
	Hansa's rate @ 17/6.....	299.08	
			\$450.28
Aug. 15	250 sacks flour, per Lodovica.		
	Paid @ 42/6 plus 10%.....	\$124.89	
	Hansa's rate @ 14/6.....	46.54	
			\$78.35
323			
1901.			
Aug. 14	33 cases Gen. Mehdse, per Lodovica.		
	Paid @ 50/- & 47/6 plus 10%.....	\$48.41	
	Hansa's rate @ 35/-.....	31.67	
			\$16.74
Sept. 30	2,194 bags of wheat, per Susquehanna.		
	Paid @ 42/6 plus 10%.....	\$2,546.67	
	Hansa's rate @ 25/-.....	1,363.29	
			\$1,183.38
Sept. 30	750 sacks flour, per Susquehanna.		
	Paid 42/6 plus 10%.....	\$372.38	
	Hansa's rate @ 25/-.....	199.38	
			\$173.00
Sept. 30	400 sacks flour, per Susquehanna.		
	Paid @ 42/6 plus 10%.....	\$198.61	
	Hansa's rate @ 25/-.....	92.17	
			\$106.44
Oct. 4	350 sacks flour, per Susquehanna.		
	Paid @ 42/6 plus 10%.....	\$173.77	
	Hansa's rate @ 25/-.....	81.27	
			\$92.50

Oct. 16	214 cases Gen. Mehdse, per Susquehanna.		
	Paid @ 47/6 & 56/- plus 10%.....	\$126.57	
	Hansa's rate @ 35/-	84.32	
			\$42.25
Oct. 16	50 cases Gen. Mehdse, per Susquehanna.		
	Paid @ 45/- plus 10%.....	\$11.25	
	Hansa's rate @ 35/-	6.34	
			\$4.91
Oct. 21	260 cases Gen. Mehdse, per Susquehanna.		
	Paid @ 45/- plus 10%.....	\$92.75	
	Hansa's rate @ 35/-	59.80	
			32.95
Sept. 30	6 cases Gen. Mehdse, per Inchulva.		
	Paid @ 45/- plus 10%.....	\$19.68	
	Hansa's rate @ 35/-	13.48	
			\$6.20
Oct. 4	1,000 casks Oil per Inchulva.		
	Paid @ 32/6 plus 10%.....	\$398.17	
	Hansa's rate @ 20/-	222.83	
			\$175.34
Oct. 3	100 cases Gen. Mehdse, per Inchulva.		
	Paid @ 45/- plus 10%.....	\$28.44	
	Hansa's rate @ 30/-	19.50	
			\$9.94
Oct. 3	624 cases Gen. Mehdse, per Inchulva.		
	Paid @ 45/- & 55/- plus 10%.....	\$374.83	
	Hansa's rate @ 35/-	263.29	
			\$111.54
Total.....			\$8,485.45

324 PLAINTIFFS' EXHIBIT X, APRIL 22, 1909. E. H. C., STEN.

South Africa.

Steamer.	Sailed.
Hyanthes.....	Aug. 9 1902
Hilarius.....	Sep.
Egremont Castle.....	Oct. 7 1902
Westminster.....	Nov. 9 1902
Heathglen.....	Dec. 8 1902
Heathburn.....	Jan. 8 1903
Clematis.....	Feb. 19 1903
Ferndene.....	Mar. 15 1903
Croyden.....	Apl. 22 1903
St. Quentin.....	May 14 1903
Roseley.....	Jun. 19 1903
Rhodesian.....	Jul. 16 1903
Ras Elba.....	Aug. 14 1903
Glenesk.....	Sep. 26 1903
Fernley.....	Oct.
Gairloch.....	Dec. 15 1903
Auchenblae.....	Jan. 14 1904
Kurdistan.....	Jan. 29 1904

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DEFENDENTS' EXHIBIT 2.

Freight Rates Charged by Conference Lines on Grain to East London.

	1899.	1900.	1901.	1902.	1903.
Jan.		40/- 10%	42/6 10%	42/6 10%	18/9 10%
Feb.		40/- 10%	42/6 10%	42/6 10%	18/9 10%
Mar.	35/- 10%	40/- 10%	42/6 10%	42/6 10%	23/9 10%
Apr.	35/- 10%	40/- 10%	42/6 10%	32/6 10%	23/9 10%
May	35/- 10%	45/- 10%	42/6 10%	32/6 10%	23/9 10%
June	35/- 10%	45/- 10%	30/- 10%	32/6 10%	23/9 10%
July	35/- 10%	45/- 10%	30/- 10%		23/9 net
Aug.	35/- 10%	45/- 10%	42/6 10%		23/9 "
Sept.	35/- 10%	50/- 10%	42/6 10%		22/6 "
Oct.	35/- 10%	50/- 10%	42/6 10%		22/6 "
Nov.	40/- 10%	50/- 10%	42/6 10%	22/6 10%	23/9 "
Dec.	40/- 10%	50/- 10%	42/6 10%	18/9 10%	22/6 "

326 United States Circuit Court for the Southern District of New York.

HUGO ADELBERTO THOMSEN, GUSTAV A. FEDDERSON, HEINRICH Johannes Riedel, and Edward H. Muller, Composing the Firm of Thomsen & Co., Plaintiffs,
against

UNION CASTLE MAIL STEAMSHIP COMPANY, LIMITED; SIR CHARLES W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock, and John Percival, Composing the Firm of Cayser, Irvine & Co.; Bucknall Steamship Lines, Limited; Sir Donald Currie, Sir Francis Henry Evans, David Martin Currie, Frederick James Mirrielees, George Alexander Keith Wisely, Percy Alport Molteno, Alastair Currie, John MacMartin Currie, and Murland De Grasse Evans, Composing the Firm of Donald Currie & Company; Deutsche Dampschiffahrts Gesellschaft, Hansa; Herbert Barber, and James Barber, Composing the Firm of Barber & Co.; Edward N. Norton and Skeffington S. Norton, Composing the Firm of Norton & Son; Henry W. O. Edye, William Volckens, Paul Gottheil, and William L. Walther, Composing the Firm of Funch-Edye & Co., Defendants.

Assignment of Errors.

Afterwards and before the Judges of the United States Circuit Court of Appeals for the Second Circuit, come Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock and John Percival, composing the firm of Cayser,

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ine & Co.; Herbert Barber and James Barber, composing the firm Barber & Co.; and Edward N. Norton and Skeffington S. Norton, composing the firm of Nortons & Son, plaintiffs in error, by Convers Kirlin, their attorneys, and say that in the record and proceedings resaid, and also in the matters recited and contained in the said bill of Exceptions, and also in giving the verdict and judgment resaid, there is manifest error in the rulings, decisions and directions of the Judge before whom the issues joined between the parties hereto were tried, as also in other respects and particulars, and especially in this, to wit:

First. In that the Court permitted the plaintiffs to amend their complaint, paragraph seventeenth, so that it would read as follows, the words occurring in the original paragraph and omitted in the amendment being enclosed in brackets, the new matter in the amendment being in italics:

"Seventeenth. That by reason of the monopoly so created and maintained by the [all] defendants herein, except the Hansa line and Funch, Edye & Company, prior to November, 1901, and by said defendants together with the Hansa line and Funch, Edye & Company ever since November, 1901, the merchants in the United States doing business in the exporting trade to South African ports, among whom are these complainants, have been restrained from trading freely with said ports, through such carrier or carriers as offer the best and most reasonable facilities and inducements, but have been compelled to submit to the hardships and inconvenience of the monopoly created and maintained by [all of] the said defendants [herein] *as aforesaid*, and to pay the higher rates of freight *as aforesaid*; and by reason of their compulsory submission to the monopoly so unreasonably, unwarrantably and unlawfully created and maintained by [all] the *said* defendants, [herein] *aforesaid*, the same have been enabled to compel [payment] *payments* from the various shippers to South African ports, among whom the complainants, of large amounts or freight paid at the time of shipment on the basis of the higher unreasonable and unlawful rates exacted by the said defendants, as above set forth, and to such an extent to leave at the present time in defendants' possession collectively, complainants are informed and verily believe, about the sum of one million and a half of dollars, or more, representing the extortionate amount received in excess and made up by the difference between the higher rate exacted and collected at the time of shipment as above set forth, and the lower [rate] *rates*, alleged by the defendants as *aforesaid* to be fair and reasonable [rate] *rates*, and of such amount the sum of £1,112, 7s. 11d. has been forcibly so received, exacted and extorted from the complainants herein by the said defendants."

Second. In that the Court denied the request of the defendants that a juror be withdrawn so that the defendants might be permitted to meet the additional charge contained in the amendment.

Third. In that the Court excluded the following question addressed to the witness Herbert Barber:

"Q. Having regard to the conditions of this trade as you have described them, was it commercially practicable for any one member of this conference, or any other individual ship owner, to
329 supply the needs of the South African trade by sailing vessels?

Objected to.

Objection sustained. Exception by defendants."

Fourth. In that the Court allowed the question addressed to the witness Herbert Barber and his answer thereto as follows:

"Q. These commissions which you were paid for your agency in transacting this business, were they pooled between you and Norton divided on a fixed basis?

Mr. KIRLIN: We object to that. There is no allegation in the complaint about this. That is entirely their own private business.

Mr. BAYNE: This is a defendant in this action; it is a conspiracy that I have charged, and I am attempting to show co-operation.

Objection overruled. Exception by defendants.

Q. Were they pooled between you?

A. They were pooled at the present time, but they were not pooled all the time during your period of action."

Fifth. In that the Court admitted over the defendant's objection and exception evidence from the witness, Adam Sulima, with respect to an offer alleged by the plaintiffs to have been received for about 400 tons of wheat at \$50 a ton on July 19, 1901, and the profits, amounting to between \$450 and \$500, that the plaintiffs claimed that they lost by reason of their failure to accept that offer.

Sixth. In that the Court admitted evidence over defendants' objection and exception from the witness Adam Sulima of another offer for wheat claimed to have been received by the plaintiffs
330 on July 24, 1901, and the profits, amounting to between \$1,350 and \$1,400, that the plaintiffs claimed that they lost by reason of their failure to accept that offer.

Seventh. In that the Court admitted evidence over the defendants' objection and exception from the witness Adam Sulima of orders for cereals claimed to have been received by plaintiffs on July 10, 1902, and the profits, amounting to \$1,200, that the plaintiffs claimed that they lost by reason of their failure to accept the offers.

Eighth. In that the Court admitted evidence over the defendant's objection and exception from the witness Adam Sulima that the plaintiffs made certain shipments and had offers of rates from the Hansa Lines during the period of the shipments as shown on plaintiffs' exhibit A-3.

Ninth. In that the Court admitted evidence over the defendants' objection and exception from the witness Adam Sulima of the alleged difference between the amount of freights paid to the so-called conference lines during a period of nine months, and the rates alleged by the plaintiffs to have been available to them by the Hansa Line during the four months preceding.

Tenth. In that the Court allowed the questions addressed to the witness, Adam Sulima, and the answers of the witness as follows:

“Q. I will ask the single question, what was the total amount paid by you in freights and in ten per cents, to the conference lines from October 25, 1901, when Hansa joined the conference, and
331 during the succeeding period up — June, 1902, during which there was no opposition?

Mr. KIRLIN: I object to that as immaterial and irrelevant. Objection overruled. Exception by defendants.

A. The total amount of freight paid during the period mentioned by you was \$23,106.39.

Q. During the period I have just referred to how did the rates which were charged by the conference compare with the rates which had been available during the Hansa competition?

Mr. KIRLIN: I object to that as immaterial and irrelevant. Objection overruled. Exception by defendants.

A. The rates charged then by the conference line were about the highest in its history. They were as high, and they were at least 25 per cent. higher than the rates which were available from the opposition line.

Q. During the period of the competition of the Hansa Line?

A. Yes, sir, from 20 to 25 per cent.”

Eleventh. In that the Court declined to grant the motion made at the close of the plaintiffs' case, and renewed after the testimony by both sides had been completed, to dismiss the complaint as to the defendants composing the firm of Norton & Son, who were agents for the defendants composing the firm of Donald, Currie & Co., with respect to whom the complaint had been dismissed.

Twelfth. In that the Court, after the testimony by both sides had been completed, refused to direct the jury to bring in a verdict in favor of the defendants composing the firm of Cayser, Irvine
332 & Co., the defendants composing the firm of Barber & Co. and the defendants composing the firm of Norton & Son.

Thirteenth. In that the Court, after the testimony on both sides had been completed, refused to direct the jury to bring in a verdict in favor of all the defendants on the ground that the cause of action charged in the complaint against them had not been established by the proof.

Fourteenth. In that the Court, after all the testimony on both sides had been completed, declined to direct the jury to bring in a verdict in favor of the defendants composing the firm of Barber & Co.

Fifteenth. In that the Court refused to leave certain questions to the jury as indicated by the following:

“Mr. KIRLIN: If your Honor please, I desire to except to these parts of your charge in which you instructed the jury that all the defendants, including the agents, had in fact entered into a combination which was contrary to statute, and request that the question of whether they had actually entered into a combination unlawful

within the definition of the Court be left to the determination of the jury.

The COURT: I will deny that.

Exception by defendants."

The part of the charge specifically dealing with that matter is as follows:

"Now, gentlemen, as regards the asserted combination, the only testimony is not conflicting, and, considering it together with the printed circulars exhibits A and B in evidence, I think an unlawful combination such as the Sherman Act condemns is fairly
383 proven by the plaintiffs. Hence I instruct you, as a matter of law, that the defendants, in violation of the anti-trust statute, entered into a conspiracy or unlawful combination in restraint of foreign trade and commerce. By such unlawful acts Cayer, Irvine & Co., Norton & Son and Barber & Co. and others associated with them created a monopoly of the transportation by water of the products of this country between the port of New York and South Africa."

Sixteenth. In that the Court charged the jury that the defendants remaining in the case would be liable for acts done by those who had been dismissed from the case at the times subsequent to December, 1898, when the conspiracy is alleged to have been formed.

The part of the charge dealing with this matter is as follows:

"Then the defendants would be liable for whatever illegal acts were done by Bucknall Brothers, or by Bucknall Lines, Limited, or by the Union Castle Mail Steamship Company, Limited, or by any other persons or corporations in combination with them, in furtherance of the common purposes of the combination, the same as though the illegal acts by the Bucknall Lines, by the Union Castle Mail Steamship Line, or by any of the others, had been done by the defendants themselves."

In this connection is to be considered the other portion of the charge already referred to in which the Court instructed the jury as a matter of law that the acts of the defendants amounted to a conspiracy or unlawful combination in restraint of trade in violation of the statute.

The defendants duly excepted to that part of the charge.

Seventeenth. In that the Court charged the jury that the
384 defendants were chargeable with the consequences of the acts of the Hansa Line as contained in this portion of the charge:

"In the same way, the defendants above referred to would be liable for whatever was done by the so-called Hansa Line, after that line joined the combination to the same extent as though what was done by the Hansa Line had been done by the defendants themselves.

The defendants duly excepted to that part of the charge.

Eighteenth. In that the Court charged the jury that the defendants were liable for the acts of those who had been dismissed and who were not parties during the whole time of the conspiracy alleged.

The part of the charge dealing with this matter is as follows:

"The law is that where an illegal combination in violation of the

Sherman Act is formed and put in operation, every member of the combination while he was a member of it is responsible for every act done by every other member of the combination during the same period pursuant to its common purposes. Hence, as the defendants were members of the combination during the entire period mentioned in the complaint, they are responsible for the acts of Bucknall Brothers, the Bucknall Steamship Lines, Limited, the Union Castle Mail Steamship Company, Limited, the Hansa Line, and any others who were in combination with the defendants for portions of the entire period."

The defendants duly excepted to that part of the charge.

Nineteenth. In that the Court charged the jury that as a matter of law the agents became parties to an unlawful conspiracy by what they did in connection with the business of the conference in New York.

335 The part of the charge dealing with this matter is as follows:

"Evidence was given by the plaintiffs tending to show that conferences were held in this country to determine what the carrying rate should be, and that the agents or representatives of the lines in the combination reported their action to the London office or to their principals. This, in my judgment, under the law, makes the agents liable, especially as they concededly profited by the violation complained of.

The defendants duly excepted to that part of the charge."

Twentieth. In that the Court left to the jury the question of the plaintiffs' claim for approximately \$6,700, representing what the plaintiffs claimed they might have made by shipping on the Hansa opposition during the period of the Hansa competition.

The portion of the charge dealing with that matter is this:

"The third item of damages arises from the lower rates which the Hansa Line had established prior to joining the combination. Plaintiffs claim they were coerced not to accept such rates and ship their goods by the Hansa Line, and they claim that they failed to take advantage of this low rate of shipment because they had on deposit somewhere in the neighborhood of \$3,500 or \$4,000 with the defendants, and under this contract to which I have already referred they would have lost this 10 per cent. which they had on deposit with the defendants, and they claim that because they were deprived of shipping their commodity to South Africa by this Hansa Line, a competing line at the time, they lost in the neighborhood of \$6,700.

It remains for you to say whether they did or not. It remains
336 for you to say whether the plaintiffs have by a fair preponderance of the evidence proved their loss in that regard."

The defendants duly excepted to that part of the charge.

Twenty-first. In that the Court refused to charge the jury as requested by defendants as follows:

"1. A verdict cannot be rendered in favor of the plaintiffs based upon no other injury than such as resulted from the contracts of shipment which the plaintiffs entered into with defendants at agreed rates and the payments made in accordance with such contracts.

The COURT: I will deny that.

Exception by defendants."

Twenty-second. In that the Court refused to charge the jury as requested by the defendants as follows:

"2. A verdict cannot be rendered for the plaintiff based upon no other loss to plaintiffs than such as resulted from contracts of shipment contained in the bills of lading entered into between the plaintiffs and defendants and payments made thereon.

The COURT: I will deny that.

Exception by defendants."

Twenty-third. In that the Court refused to charge the jury as requested by the defendants as follows:

"3. There can be no verdict in favor of the plaintiffs unless you find that a payment of money was wrongfully induced by defendants.

The COURT: I will deny that.

Exception by defendants."

337 Twenty-fourth: In that the Court refused to charge the jury as requested by the defendants as follows:

"4. There was nothing illegal or wrongful in the contracts of shipment contained in the bills of lading or in the receipt by the defendants from the plaintiffs of the freight and primage paid thereon or thereon agreed to be paid.

The COURT: I think I covered that. I will deny that.

Exception by defendants."

Twenty-fifth. In that the Court refused to charge the jury as requested by the defendants as follows:

"5. It is essential to any recovery by plaintiffs on account of any loss caused to them by payments under contracts of shipment that it should appear that the rates charged were unreasonably high and in excess of what the service was worth, having regard to the right of the defendants to receive at least a fair profit

The COURT: I think I charged that substantially. I will deny it.

Exception by defendants."

Twenty-sixth: In that the Court refused to charge the jury as requested by the defendants as follows:

"10. The firm of Barbour & Company find the firm of Norton & Son are alleged to be among the parties who entered into such contract or agreement, and engaged in and formed such combination and conspiracy, prior to December in the year 1898. If you find that either Barber & Company or Norton & Son did not enter into such contract or agreement, or engage in and form such
338 illegal combination and conspiracy at that time, your verdict must be for the defendants generally.

The COURT: I think I have covered that sufficiently. I will deny that.

Exception by defendants."

Twenty-seventh. In that the Court refused to charge the jury as requested by the defendants as follows:

"18. The plaintiffs claim the right to recover herein certain rebates enumerated in Plaintiffs' Exhibit A-2, on shipments made prior to November 15, 1900, aggregating £381:2:4 on steamers of

which Norton & Son were agents, and aggregating £211:8:9 on steamers on which Barber & Co., were agents, amounting in the aggregate to £592:11:1. No part of this sum claimed as return commissions can be recovered against the defendants in this action.

The COURT: I will deny that.

Exception by defendants."

Twenty-eighth. In that the Court refused to charge the jury as requested by the defendants as follows:

"25. If the jury should find that the plaintiffs are entitled to recover in this proceeding the commissions claimed by them, or such part of such commissions as fell due on shipments made in pursuance of a conference between all the defendants, then they should disallow any recovery in respect of the three orders referred to by the plaintiffs as having been received on July 19, and July 26, 1901, and July 10, 1902, for it would follow from such finding by the jury that the plaintiffs were not actually restrained by the circulars

339 A and B from making the said three shipments for which they had orders, and any loss that they may have suffered in failing to fill such orders would be due to the plaintiffs' voluntary act, and not to any act of the defendants.

The COURT: I will deny that.

Exception by defendants."

Twenty-ninth. In that the Court refused to charge the jury as requested by the defendants as follows:

"27. The undisputed evidence shows that all the shipments made by the plaintiffs that are related to this action were made under conditions determining the repayment of the commissions to which the plaintiffs in each instance subscribed, and the benefits of which the plaintiffs enjoyed for an extended period of time. If the arrangement under which the commission of ten per cent *were* to be repaid was unlawful the plaintiffs are barred by their participation in the arrangement from the recovery of any sum withheld by the defendants, or any of them, according to the terms of that arrangement.

The COURT: I will deny that.

Exception by defendants."

Thirtieth. In that the Court refused to charge the jury as requested by the defendants as follows:

"Mr. KIRLIN: I ask your Honor also to charge that the fact that the defendants were willing to return the 10 per cent to those who shipped exclusively by their lines, while it may be considered by the jury with the other evidence, is not conclusive evidence that the net rate without the primage was a remunerative rate, such as the defendants were entitled to receive, and that unless the preponderance of the proof shows that the net rate and the primage taken

340 together constituted an excessive or unreasonable rate, the defendants are entitled to a verdict.

The COURT: I will deny that.

Exception by defendants."

Thirty-first. In that the Court refused to charge the jury as requested by the defendants as follows:

"Mr. KIRLIN: And also that the burden of proof to show that the rate was excessive and unreasonable was upon the plaintiffs, and that it was not the burden of the defendants to prove that the rates were not excessive.

The Court: I will deny that.

Exception by defendants."

Thirty-first. In that the Court in the presence of the jury denied the motion of the defendants for a new trial, made on the minutes, on the ground that the verdict was excessive, contrary to the evidence and contrary to the law.

Thirty-second. In that the court trebled the verdict found by the jury, with interest, and allowed to counsel for the plaintiffs a counsel fee of \$2,500.

CONVERS & KIRLIN,
Attorneys for Defendants.

(Endorsed:) United States Circuit Court, Southern Dist. of New York. Hugo Adelberto Thomsen et al., Plaintiffs, against Union Castle Mail Steamship Co., Ltd., et al., Defendants. Assignments of Error. Convers & Kirlin, Attorneys for Defendants, 27 William Street, New York, N. Y. U. S. Circuit Court, Southern District N. Y. Filed Jul-7, 1909. John A. Shields, Clerk.

341 Circuit Court of the United States of America for the Southern District of New York, Second Circuit.

HUGO ADELBERTO THOMSEN, GUSTAV A. FEDDERSON, HEINRICH JOHANNES RIEDEL and EDWARD H. MULLER, Composing the Firm of Thomsen & Co., Plaintiffs,

against

UNION CASTLE MAIL STEAMSHIP COMPANY, LIMITED, SIR CHARLES W. CAYSER, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock and John Percival, Composing the Firm of Cayser, Irvine & Co., Bucknall Steamship Lines, Limited, Sir Donald Currie, Sir Francis Henry Evans, Davis Martin Curry, Frederick James Mirrieles, George Alexander Keith Wiseey, Percy Alport Molteno, Alastair Currie, John MacMartin Curria and Murland De Graese Evans, Composing the Firm of Donald, Currie & Company; Herbert Barber and James Barber, Composing the Firm of Barber & Co., Edward N. Norton and Skeffington S. Norton, Composing the Firm of Norton & Son, Defendants.

Know All Men By These Presents, that the National Surety Company, having an office and principal place of business at No. 115 Broadway, in the City of New York, County and State of New York, is held and firmly bound unto the above-named Hugo Adelberto Thomsen, Gustav A. Feddersen, Heinrich Johannes Riedel and Edward H. Muller, composing the firm of Thomsen & Co., in the sum of Thirty thousand (\$30,000.00) Dollars, to be paid

to the said Hugo Adelberto Thomsen, Gustav A. Feddersen, Heinrich Johannes Riedel and Edward H. Muller, composing the firm of Thomsen & Co., for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seal and dated this 29th day of June, in the year of our Lord one thousand nine hundred and nine.

Whereas, the above-named Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock and John Percival, composing the firm of Cayser, Irvine & Co., Herbert Barber and James Barber, composing the firm of Barber & Co., and Edward N. Norton and Skeffington S. Norton, composing the firm of Norton & Son, have prosecuted a writ of error to the United States Circuit Court of Appeals for the Second Circuit to reverse the judgment rendered in the above-entitled suit by the Judge of the Circuit Court of the United States for the Southern District of New York.

Now, Therefore, the condition of this obligation is such, that if the above-named Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock and John Percival, composing the firm of

343 Cayser, Irvine & Co., Herbert Barber and James Barber, composing the firm of Barber & Co., and Edward N. Norton and Skeffington S. Norton, composing the firm of Norton & Son, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Sealed and delivered, and taken and acknowledged this 29th day of June, 1909, before me

[SEAL.]

NATIONAL SURETY COMPANY,
By ARTHUR P. WEST,
Resident Vice-President.

Attest:

M. W. GEWECKE,
Resident Assistant Secretary.

344 *Affidavit, Acknowledgment and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 29th day of June, one thousand nine hundred and nine, before me personally came Arthur P. West, known to me to be the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing bond of Cayser, Irvine & Co., Barber & Company and Norton & Son, as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that

he is the Res. Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of Cayser, Irvine & Co., Barber & Company and Norton & Son is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Res. Vice-President of said Company, and that he is acquainted with M. W. Gewecke and knows him to be the Res. Ass't Secretary of said Company; and that the signature of said M. W. Gewecke subscribed to said Bond is in the genuine handwriting of said M. W. Gewecke, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever by more than the sum of Two million dollars.

ARTHUR P. WEST.

Sworn to, acknowledged before me, and subscribed in my presence this 29th day of June, 1909.

[SEAL.]

ETTA B. GEWECKE,

Notary Public for County of Kings.

Certificate filed in the City of New York, Queens, Richmond, Westchester and Nassau Counties.

(Endorsed:) Approval as to form and also as to sufficiency of sureties, with reservation, however, to the complainants of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally.—E. H. Lacombe, U. S. Circuit Judge.—U. S. Circuit Court, Southern District N. Y.—Filed Jul- 3, 1909.—John A. Shields, Clerk.

By The Honorable E. Henry Lacombe, One of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to Hugo Adelberto Thomsen, Gustav A. Fydderson, Heinrich Johannes Riedel, and Edward H. Muller, Composing the Firm of Thomsen & Co., Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 30th day of July, 1909, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock and John Percival, composing the firm of Cayser, Irvine & Company; Herbert Barber

and James Barber, composing the firm of Barber & Company; Edward N. Norton and Skeffington S. Norton, composing the firm of Norton & Son, are plaintiffs, and you are defendants, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 6th day of July, in the year of our Lord one thousand nine hundred nine, and of the Independence of the United States the One Hundred and Thirty-fourth.

E. H. LACOMBE,

*Judge of the Circuit Court of the United States
for the Southern District of New York, in the
Second Circuit.*

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit.—Sir Charles W. Cayser et al., Plaintiffs in Error, vs. Hugo Adelberto Thomsen et al., Defendants in Error.—Citation.—Copy received Jul- 10, 1909.—Ullo, Ruebsamen & Yuzzolino.—U. S. Circuit Court, Southern District N. Y.—Jul- 13, 1909.—John A. Shields, Clerk.

347 United States Circuit Court of Appeals for the Second Circuit,
October Term, 1910.

No. 189.

THE UNION CASTLE MAIL STEAMSHIP COMPANY, LTD., et al.,
Plaintiffs-in-Error,

vs.

HUGO ALBERTO THOMSEN et al., Defendants-in-Error.

In Error to the Circuit Court of the United States for the Southern
District of New York.

Argued May 8, 1911; Decided July 26, 1911.

Before Lacombe, Coxe, and Noyes, Circuit Judges.

Writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of the defendants-in-error, who were plaintiffs below, in an action for the recovery of treble damages under the federal anti-trust statute. The case was before this Court before (166 Fed. 251) upon a writ of error sued out by the plaintiffs because their complaint was dismissed.

348 NOYES, *Circuit Judge*:

When this case was in this Court before we said, upon the authority of the decisions of the Supreme Court as we then interpreted

them, that whether the restraint of trade imposed by the combination in question was reasonable or unreasonable was immaterial. It is also apparent from the record that the Circuit Court upon the second trial in holding as a matter of law that the combination shown was in violation of the statute, acted upon the same view of the law.

In the light of the recent decisions of the Supreme Court in the Standard Oil and Tobacco cases, the construction so placed upon the statute by this Court and the Circuit Court must be regarded as erroneous and a new trial must be granted unless the contentions of the parties are correct that, upon the facts shown, this Court can now determine the legality of the combination.

It is, however, on the one hand, impossible for us to hold as a matter of law that the acts of the defendants as disclosed upon the present record amount to a combination in unreasonable restraint of trade. And, on the other hand, we think that it would be unduly prejudicial to the plaintiffs to reverse the judgment with instructions to dismiss the complaint. The plaintiffs presented their case in view of the decision of this Court that the reasonableness of the restraint imposed was immaterial and it would be most unjust to dismiss the complaint because their proof did not conform to another standard. Upon another trial the plaintiffs may be able to produce additional testimony tending to make out a case within the Supreme Court decisions referred to.

The judgment of the Circuit Court is reversed and a new trial ordered.

J. Parker Kirlin and Thomas Thacher, For the Plaintiffs-in-Error.
Lorenzo Ullo, For the Defendants-in-Error.

349 United States Circuit Court of Appeals for the Second Circuit,
October Term, 1910.

No. 189.

THE UNION CASTLE MAIL STEAMSHIP COMPANY, LTD., et al.,
Plaintiffs-in-Error,

VS.

HUGO ALBERTO THOMSEN et al., Defendants-in-Error.

In Error to the Circuit Court of the United States for the Southern
District of New York.

Argued May 8, 1911; Decided July 26, 1911.

Before Lacombe, Coxe, and Noyes, Circuit Judges.

COXE, J. (dissenting):

I am unable to agree with the majority. Courts are organized to reach results within a reasonable time. This action was begun eight years ago, it has been tried twice, the last trial occupying five days; it has been argued twice in this court. In such circum-

stances it is obvious that the labor of so many years should not be set at naught unless manifest error compels it.

The sole reason assigned for reversal is that this court stated in its former opinion, what was unquestionably the law at that time, that where it was shown that a contract, combination or conspiracy actually restrained trade or commerce, it was immaterial whether such restraint was reasonable or unreasonable. It is asserted that the trial judge followed this view of the law in holding that the combination in question was in violation of the statute and that his ruling in this regard was error. I am unable to discover the ruling, exception or assignment of error which supports this contention or presents this question. As the evidence of the unlawful conspiracy is in writing, there was no controverted fact regarding its terms.

Clearly it was the duty of the court and not of the jury to construe this uncontradicted evidence. The only question of fact which it was necessary to determine, in order properly to interpret the agreement between the carriers, was submitted to the jury with clear and careful instructions. The judge charged as follows:

"Now the right of recovery herein depends upon whether the rate charged the plaintiffs was reasonable or unreasonable, and if it was unreasonable, all the defendants, by their unlawful combination in restraint of trade, coerce or compel the plaintiffs to pay a rate greater than a reasonable rate, simply to effectuate the primary purpose of the combination, namely, to prevent competition in the transportation of merchandise. * * * Now, gentlemen, notwithstanding the fact that I have stated to you as matter of law that this was a combination forbidden by the Sherman Act, the question submitted to you is whether the rate was reasonable or unreasonable, and that is a question to be determined by you, and it is for you to say whether the 10 per cent. was charged to coerce the plaintiffs to patronize the same ships or not. * * * If, in your judgment, the rate charged by these lines during this period of time was not excessive, if it was reasonable and just, in view of the conditions and circumstances to which I will refer hereafter, then that ends the case, and you will pay no further attention to any of the questions here involved, for in that event, your verdict will be for the defendants."

There is much more to the same effect but the foregoing is sufficient.

The language of the court seems almost prophetic of the rule of the recent decisions of the Supreme Court. If the Standard Oil and Tobacco decisions had been before him while delivering the charge, it is not easy to see how the judge could have followed them more accurately. We have, then, a combination which the jury has found restrained trade by the imposition of excessive and unreasonable charges. In other words, a combination forbidden by the law,

whether the "rule of reason" be or be not applied. No one pretends that any new facts will be presented at a new trial.

Should one be ordered, the case will appear for a third time in this court upon the same facts and we will then have to render a decision which should, in my judgment, be rendered now.

In its last analysis, the question, whether the agreement in controversy is within the prohibition of the Sherman Act, is one of law for the court and should be answered without further delay. The alleged error considered by the majority is not presented by the record but, even if it were, the question is one of law which should be disposed of by the court on the present record.

352 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building, in the City of New York, on the 5th day of August, One Thousand Nine Hundred and Eleven.

Present:

Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Walter C. Noyes, Circuit Judges.

UNION CASTLE MAIL STEAMSHIP COMPANY, LTD., et al., Plaintiffs
in Error,

vs.

HUGO ADELBERTO THOMSEN et al., Defendants in Error.

Error to the Circuit Court of the United States for the Southern
District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it hereby is reversed with costs and a new trial ordered.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

W. C. N.

353 Endorsed: United States Circuit Court of Appeals, Second Circuit. Union Castle Mail SS. Co. vs. H. A. Thomsen et al. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Aug. 9, 1911. William Parkin, Clerk.

354 United States Circuit Court of Appeals for the Second Circuit.

THE UNION CASTLE MAIL SS. CO., LIMITED, et al.; SIR CHARLES W. CAYSER et al., Plaintiffs in Error, Defendants Below.

VS.

HUGO ADELBERT THOMSEN et al., Defendants in Error, Plaintiffs Below.

Petition for Rehearing.

United States Circuit Court of Appeals, Second Circuit.

Filed Aug. 28, 1911. William Parkin, Clerk.

To the Honorable United States Circuit Court of Appeals for the Second Circuit:

The plaintiffs below, defendants herein, respectfully make this application for a rehearing of this case, with a view that judgment final be rendered or an opportune certificate to the Supreme Court be submitted in the above entitled case, and that for such purpose the mandate of this Court be recalled.

The decision ordering a new trial in the above entitled case was handed down on the 17th day of July, 1911; that is to say, 355 within the present term of this Court, and the mandate therein was dated August 9, 1911.

The grounds for the rehearing prayed for are that the plaintiffs herein are satisfied to have a decision finally determining the questions as presented in the case upon its record as is now existing in the files of this Court.

The plaintiffs believe that they have "made out a case within the rulings of the Supreme Court decisions rendered in the Standard Oil and Tobacco cases."

First. In their memorandums submitted after the Standard Oil and Tobacco decisions were rendered by the Supreme Court neither party to the present case claimed that this case brought on this writ could not be disposed of upon the admissions and proofs of facts as found in the record.

The defendants below then asked for a judgment of reversal, "with directions to dismiss the complaint," while before those decisions were rendered they had asked that the judgment below be reversed "and a new trial ordered." The plaintiffs even then continued still to ask for affirmance of the judgment on the facts admitted and the facts found by the jury. They claimed, and still claim, that those facts constituted a restraint of trade within the meaning of the Sherman Law reasonably construed by that "Standard" which the United States Supreme Court has said should "be resorted to for the purpose of determining whether the provisions contained in the statute had or not in any case been violated."

Second. What additional testimony tending "to make out a case

356 within the Supreme Court decisions referred to" could be further produced on behalf of the plaintiffs' contention is very difficult to conceive. They are satisfied with the present record of the case on appeal.

Third. The Standard which the Supreme Court has set in order to secure a reasonable construction of the Sherman Act has been based by the Supreme Court upon consideration of "the development of more accurate economic conceptions and the changes in conditions of society"—upon "a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals—upon "the survey of the legislation in this country on this subject * * * depending, as it did, upon economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered"—upon the "view of the many new forms of contracts and combinations which were being evolved from existing economic conditions."

Fourth. Such considerations of "economic conceptions," or of "economic conditions" or of "economic forces" involve matters depending upon and concerning the public policy prevailing under the Government of the United States.

Such matters are not and cannot be determined by a jury upon the production of witnesses, so-called experts in economics or finance.

Necessarily the courts have power to take judicial notice of those matters of public policy while determining the issues in each case, presenting facts admitted or facts found by a jury or otherwise. Such judicial power is as necessarily exercised with the light of reason radiating from those economic conceptions, economic
357 forces, economic conditions, in order to determine whether or not those facts reasonably amount to a restraint of trade.

Fifth. The defendants admitted in their main brief, what the plaintiffs do not controvert, that the restraint condemned under the act may "be found by presumptions based on judicial knowledge" (page 50). Plaintiffs also do not controvert the proposition then called forth by defendants in their brief, viz.: that embodied in the statement made by Mr. Culbertson to the House of Representatives, to the effect that "what combinations will be in the restraint of commerce will not be known until the courts shall have construed and interpreted this provision" (page 51). Nor do plaintiffs controvert or question the quoted statement of Mr. Taft speaking at Bath, Maine, 1906, in which he said that "the matter was apparently turned over to the courts as cases arose and decisions were invoked to work out the exact character of the offenses denounced" (page 51).

Sixth. Plaintiffs' counsel even goes so far as to accept without reservation the suggestion of the defendants' counsel, that the functions of the courts in working out the character of the offenses denounced by the anti-trust act "are largely legislative" (page 53).

Seventh. Plaintiff's claim that without the production of further testimony the facts as presented by the record are sufficient to enable the court to exercise its power to take judicial notice in determining the issues by the aid of the light of reason kindly leading to those economical considerations of public policy.

358 Eighth. Plaintiffs are also satisfied that, in the exercise of its powers, and upon the record as it stands, this Court should consider the English Mogul case quoted by the Supreme Court, inasmuch as that case presents a combination or "conference," the elements of which are substantially similar to the "conference" presented in the present record, although the nature of the action and the facts there presented are entirely different from those presented in the present case.

The English Mogul case is not quoted by the Supreme Court with approval. It has only been referred to in that part of the Standard Oil decision where the Supreme Court was considering "the development of more accurate economic conceptions and the changes in conditions of society," and when considering what by reason of such development "became the rule in the English law." While the Supreme Court has abstained from animadverting upon the English decision, it has, however, avoided to pass upon its effect in relation to our laws and to our courts.

Moreover, it has very significantly remarked that, coming after the passage of the anti-trust act, "it serves reflexly to show the exact state of the law in England at the time the anti-trust statute was enacted." It is significant that the Supreme Court should have compared the time of the passage of the act with the time when the English decision was rendered. The anti-trust act was, in fact, enacted between the time that the Mogul case was decided by the British Appellate Court and that when that decision was affirmed by the House of Lords.

The significance of that comparison in time could not very well have been made, because "it serves to show reflexly" that the public policy of England is reflected in our anti-trust act; for in 359 that English decision it is avowedly stated that the English public policy is "against all fetters on combination and competition." It is more probable that the Supreme Court meant to argue from that comparison in time that the two countries intended to declare, by reflex action, a dissent consonant with their respective public policy, that of protection and of anti-trust legislation on the one hand as against that of free trade and of free combination on the other. Whether this is so or not, it is still open for our Supreme Court to follow or to disapprove that English decision.

Ninth. Upon a final decision of the present appeal by this Court or upon an opportune certificate submitted to the Supreme Court these plaintiffs would finally know whether or not such a combination as admitted in this case, together with all proofs in the case and all facts as found by the jury, is or not reasonably condemned by the statute as in restraint of trade.

Wherefore plaintiffs pray for a rehearing of the present case, and that upon such rehearing being had, judgment final be rendered upon the record, or questions of law, such as are presented by the case upon the record as it stands, be certified to the Supreme Court for final decision thereon.

LORENZO ULLO,
*Attorney for Defendants-in-Error,
Plaintiffs Below.*

I hereby certify that in my opinion the foregoing petition is well found in point of law and is not made for the purposes of delay.

LORENZO ULLO,
Attorney-at-Law.

6082.

360 United States Circuit Court of Appeals for the Second Circuit,
October Term, 1910.

Petition Filed August 28, 1911; Decided October 23, 1911.

No. 189.

THE UNION CASTLE MAIL STEAMSHIP COMPANY, LTD., et al.,
Plaintiffs-in-Error,

VS.

HUGO ADELBERTO THOMSEN et al., Defendants-in-Error.

In Error to the Circuit Court of the United States for the Southern
District of New York.

Before Lacombe, Coxe and Noyes, Circuit Judges.

Per Curiam:

We understand from the petition of the plaintiffs below that they do not desire to present additional testimony and do not wish a new trial of this action. We understand also that they are willing to stand on the record as made, and that they prefer instead of a decision granting a new trial, a decision reversing the judgment and directing the Circuit Court to dismiss the complaint in order that they may carry the case to the Supreme Court without further delay. If we are correct in this supposition, we are prepared to recall the mandate, order a rehearing, reverse the judgment and direct the Circuit Court to dismiss the complaint.

361 Ullo, Ruebsamen & Yuzzolino, Counsellors at Law.

Lorenzo Ullo.
Herman A. Ruebsamen.
Albert M. Yuzzolino.
Harold R. Lhowe.

Telephone 2550, 2551 Rector.

Cable Address, "Ullo."

BOWLING GREEN BUILDING,
11 BROADWAY, NEW YORK, November 15, 1911.

Clerk of the U. S. Circuit Court of Appeals, 2nd Circuit. P. O. Building, Boro. of Manhattan, N. Y. C.

Cayser vs. Thomsen, No. 185, October Term.

DEAR SIR: Will you please enter order granting a rehearing and recalling the mandate of the court in above case in accordance with

petition for rehearing presented to the court on behalf of defendants in error.

Yours respectfully,

ULLO, RUEBSAMEN & YUZZOLINO,
Per LORENZO ULLO,
Per Y.

Endorsed: Union Castle vs. Thomsen. Election by defendant in error. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 16, 1911. William Parkin, Clerk.

362 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit held at the Court Rooms in the Post Office Building, City of New York, on the 16th Day of November, 1911.

Present:

Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Walter C. Noyes, Circuit Judges.

UNION CASTLE MAIL STEAMSHIP COMPANY, LTD., et al., Plaintiffs
in Error,

vs.

HUGO ADELBERTO THOMSEN et al., Defendants in Error.

A petition for a rehearing having been filed herein by counsel for the defendants in error;

Upon consideration thereof it is

Ordered that said petition be and hereby is granted, and that the mandate of this court issued herein on August 9th, 1911, be and hereby is recalled.

It is further ordered that the order of this court filed and entered herein on July 26th, 1911, be and hereby is vacated and set aside, and that the judgment of the Circuit Court of the United States for the Southern District of New York be and hereby is reversed with costs, and that this cause be remanded to said Circuit Court with instructions to enter an order dismissing the complaint.

It is further ordered that a mandate issue accordingly.

W. C. N.

Endorsed: United States Circuit Court of Appeals, Second Circuit. Union Castle Mail S. S. Co. vs. H. A. Thomsen et al. Order United States Circuit Court of Appeals, Second Circuit. Filed Nov. 16, 1911. William Parkin, Clerk.

363 United States Circuit Court of Appeals for the Second Circuit.

SIR CHARLES W. CAYSER, CHARLES W. CAYSER, JR., AUGUST B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock, and John Percival, Composing the Firm of Cayser, Irvine & Company; Herbert Barber and James Barber, Composing the Firm of Barber & Company; Edward N. Norton and Skeffington S. Norton, Composing the Firm of Norton & Son, Plaintiffs in Error,

against

HUGO ADELBERTO THOMSEN, GUSTAVE A. FEDDERSON, HEINDRICH Johannes Riedel, and Edward H. Muller, Composing the Firm of Thomsen & Company, Defendants in Error.

Petition for a Writ of Error.

To the Honorable the Judges of the Circuit Court of Appeals, for the Second Circuit:

Your petitioners, Hugo Adelberto Thomsen, Heindrich Johannes Riedel, Gustave A. Feddersen and Edward H. Muller, composing the firm of Thomsen & Company, plaintiffs below and defendants in error in the above entitled cause respectfully show:

That a judgment has therein been rendered on the 16th day of November, 1911, reversing a judgment of the United States Circuit Court for the Southern District of New York, heretofore rendered in the said cause in favor of plaintiffs below for the sum of Twenty-five Thousand Three hundred and Ten and 90/100 (\$25,310.90) Dollars, with interest from the 28th day of April, 1909.

364 That the said cause is brought at Common Law on Section VII of the Act to protect trade and commerce against unlawful restraints and monopolies, approved July 2nd, 1890, and commonly known as the Sherman Act.

That no question of the jurisdiction of the United States Court is presented in said cause, nor does the cause arise under the patent laws, nor the revenue laws, nor the criminal laws, nor is it an admiralty case.

That it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error inasmuch as the petitioners herein consider themselves aggrieved by the said judgment so rendered by this Circuit Court of Appeals for the Second Circuit, whereby the said judgment of the United States Circuit Court for the Southern District of New York was reversed with directions to enter a judgment dismissing the complaint of the plaintiffs with costs taxed at Five hundred and Eighty-six and 02/100 (\$586.02) Dollars.

Therefore your petitioners respectfully pray that a writ of error be allowed them in the above entitled cause, directing the Clerk of this United States Circuit Court of Appeals to send the record and proceedings in said cause, with all things concerning the same to the Supreme Court of the United States, in order that the errors

complained of in the assignment of errors herewith filed by said petitioners, the plaintiffs below, the defendants in error herein, be reviewed, and if error be found corrected according to the laws and customs of the United States.

LORENZO ULLO,

Attorney for Defendants in Error.

365 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. Sir Charles Cayser et al., Plaintiffs in Error, against Hugo Adelberto Thomsen et al., Defendants in error. Petition for a Writ of Error. Lorenzo Ullo, Attorney for D'ts in Error, Office & P. O. Address, 29 Broadway, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 15, 1912. William Parkin, Clerk.

366 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, Held at the Court Rooms Thereof, in the Federal Building, in the County of New York, on the 15th Day of March, 1912.

Present:

Hon. E. Henry Lacombe, Hon. Alfred C. Cox, Hon. Henry G. Ward, Circuit Judges.

HUGO ADELBERTO THOMSEN, GUSTAVE A. PEDERSON, HEINDRICH Johannes Riedel, and Edward H. Muller, Composing the Firm of Thomsen & Company, Plaintiffs,
against

SIR CHARLES W. CAYSER, CHARLES W. CAYSER, JR., AUGUST B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, C. T. Portlock, and John Percival, Composing the Firm of Cayser, Irvine & Company; Herbert Barber and James Barber, Composing the Firm of Barber & Company; Edward N. Norton and Skeffington S. Norton, Composing the Firm of Norton & Son, Defendants.

Order Allowing Writ of Error.

On reading and filing the foregoing petition for a writ of error, and on motion of Lorenzo Ullo, attorney for the plaintiffs below it is hereby

Ordered, That a writ of error be, and it hereby is, allowed to have reviewed in the Supreme Court of the United States the judgment of the Circuit Court of Appeals for the Second Circuit heretofore entered herein on the 16th day of November, 1911, and that the amount of bond on said writ of error be, and it hereby is, annexed at
367 One Thousand (\$1,000.00) Dollars and upon filing said bond it is further

Ordered That all further proceedings upon the part of the defendants below for the enforcement of said judgment be suspended and

stayed until the final determination of the Supreme Court of the United States upon the writ of error herein granted.

E. HENRY LACOMBE, U. S. C. J.

368 (Endorsed:) U. S. Circuit Court of Appeals for the Second District. Sir Charles Cayser, et al, Plaintiffs in Error, against Hugo Adelberto Thomsen, et al, Defendants in Error. Order Allowing Writ of Error. Lorenzo Ullo, Attorney for Dfs. in Error, Office & P. O. Address, 29 Broadway, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 15, 1912. William Parkin, Clerk.

369 United States Circuit Court of Appeals for the Second District.

SIR CHARLES W. CAYSER, CHARLES W. CAYSER, JR., AUGUST B. T. CAYSER, ARTHUR E. D. CAYSER, HERBERT R. CAYSER, HUGO GIBB, JOHN G. JOSS, G. T. PORTLOCK, and JOHN PERCIVAL, Composing the Firm of Cayser, Irvine & Company; HERBERT BARBER and JAMES BARBER, Composing the Firm of Barber & Company; EDWARD N. NORTON and SKEFFINGTON S. NORTON, Composing the Firm of Norton & Son, Plaintiffs in Error, Defendants Below,
against

HUGO ADELBERTO THOMSEN, GUSTAVE A. FEDDERSON, HEINDRICH JOHANNES RIEDEL, and EDWARD H. MULLER, Composing the Firm of Thomsen & Company, Defendants in Error, Plaintiffs Below.

Assignment of Errors.

Now come Hugo Adelberto Thomsen, Gustave A. Feddersen, Heindrich Johannes Reidel and Edward H. Muller, composing the firm of Thomsen & Company, plaintiffs below, defendants in error, by Lorenzo Ullo, their attorney, and say that upon the proceedings of this Circuit Court of Appeals, for the Second Circuit Court held in the above entitled cause as appear in the record of the matters recited therein manifest error had intervened to the injury of the plaintiffs, defendants in error herein, in the rulings, decisions and opinions of this Circuit Court of Appeals for the Second Circuit, in rendering its final judgment in said cause on the 16th day of November, 1911, and such error of this Circuit Court of Appeals consists especially:

First. In reversing the judgment of the Circuit Court and in directing a final judgment to be entered dismissing the complaint of plaintiffs below, and in not affirming the said judgment.

Second. In holding that the trial judge erroneously found, as a matter of law, that the combination shown by the record was in violation of the Act of July 2, 1890, generally known as the Sherman Act.

Third. In holding that the record of the trial of the case by the Circuit Court shows that an issue had then been raised by defendants below calling on to rule that it was immaterial whether the restraint

imposed by the combination as charged in the complaint was reasonable.

Fourth. In holding that the trial judge erred in assuming that where it was shown that a contract combination or conspiracy as contemplated by the Sherman Act actually restrained trade or commerce, it was immaterial whether such restraint was reasonable or unreasonable.

Fifth. In holding that the trial judge erroneously held the view that it was immaterial whether the restraint imposed by the combination complained of in the plaintiffs' complaint as violating said Sherman Act was reasonable or unreasonable.

Sixth. In holding that in the light of the decisions of the
371 Supreme Court of the United States in the Standard Oil (221 U. S. 1.) and Tobacco (221 U. S. 106) cases it was error to so construe the said statute known as the Sherman Act as to hold that it was immaterial whether the restraint of trade imposed by the combination as complained of by the plaintiffs was reasonable or unreasonable.

Seventh. In holding that upon the record and proceedings held in the Trial Court it was impossible for this Circuit Court of Appeals to hold, as a matter of law, that the acts of defendants as disclosed upon the said record amount to a combination in restraint of trade in violation of said Sherman Act.

Eighth. In holding that the combination complained of by plaintiff was not in violation of the Sherman Act.

Ninth. In holding that the restraint of trade imposed by the combination complained of by the plaintiffs was reasonable.

LORENZO ULLO,

Attorney for the Plaintiffs in Error.

372 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. Sir Charles Cayser, et al., Plaintiff in Error, against Hugo Adelberto Thomsen, et al., Defendant in Error. Copy—Assignment of Errors. Lorenzo Ullo, Attorney for D's in Error, Office & P. O. Address, 29 Broadway, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 15, 1912. William Parkin, Clerk.

373 United States Circuit Court of Appeals for the Second Circuit.

SIR CHARLES W. CAYSER, CHARLES W. CAYSER, JR., AUGUST B. T. Cayser, Arthur D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock and John Percival, Composing the Firm of Cayser, Irvine & Co.; Herbert Barber and James Barber, Composing the Firm of Barber & Co.; Edward N. Norton and Skeffington S. Norton, Composing the Firm of Norton & Son, Plaintiffs-in-error, Defendants Below,

against

HUGO ADELBERTO THOMSEN, GUSTAV A. FEDDERSON, HEINDRICH Johannes Riedel and Edward H. Muller, Composing the Firm of Thomsen & Co., Defendants-in-error, Plaintiffs Below.

Bond on Writ of Error.

Know all men by these presents: That the Fidelity and Deposit Company of Maryland, a corporation under the laws of the State of Maryland, having an office and principal place of business for the State of New York at No. 2 Rector Street, in the Borough of Manhattan, in the City of New York, is held and firmly bound unto the above named Defendants below—Plaintiffs in error herein, in the sum of one thousand dollars (\$1,000), to be paid to the said Defendants below—Plaintiffs in error herein, in the above entitled case; for the payment of which, well and truly to be made, it binds itself, its successors and assigns, firmly by these presents.

Sealed with its seal, and dated the Sixth day of March, Nineteen hundred and twelve.

Whereas, on the 16th day of November, 1911, in the United States Circuit Court of Appeals for the Second Circuit, in a suit depending in said Court between Hugo Adelberto Thomsen, et al., Plaintiffs below, against Charles W. Cayser, et al., Defendants below, a judgment was rendered against said Plaintiffs below, the defendants in error herein, and the said Plaintiffs below, defendants

374 herein, having obtained a writ of error to the United States Circuit Court of Appeals for the Second Circuit, and filed a copy thereof in the Clerk's office of said Court, to have revised by the Supreme Court of the United States the said judgment so rendered in the above entitled suit by the said United States Circuit Court of Appeals for the Second Circuit, and a citation having been directed to the said defendants below—plaintiffs in error herein, citing and admonishing them to be and appear at a Supreme Court of the United States thirty days from the date hereof.

Now, therefore, the condition of this obligation is such, that if the above named plaintiffs below—defendants in error herein, shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then this obligation to

be void, otherwise the same to be and remain in full force and virtue.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By HUGH M. ALLWOOD, *Attorney-in-Fact.*

Attest:

[SEAL.] JAMES R. KINGSLEY,
Attorney-in-Fact.

Sealed and delivered and taken and acknowledged this 6th day of March, 1912, before me.

ERNEST L. HICKS,
Notary Public, No. 57, New York Co.

375 STATE OF NEW YORK,
County of New York, ss:

On the 6th day of March, in the year 1912, before me personally came Hugh M. Allwood, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Attorney in Fact of the Fidelity and Deposit Company of Maryland, the corporation described in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland has been duly authorized to transact business in the State of New York, in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 3, of Chapter 20, of the Session Laws of the State of New York, for the year 1893. And the said Hugh M. Allwood further said that he is acquainted with James R. Kingsley, and knows him to be the Attorney in Fact of said Company; that the signature of the said James R. Kingsley, subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley, and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said Hugh M. Allwood.

[SEAL.]

ERNEST L. HICKS,
Notary Public, New York County, No. 57.

At a regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held in its office in the City of Baltimore, State of Maryland, on the 4th day of October, 1911, the following resolution was unanimously adopted:

"Resolved, That Henry B. Platt, Vice-President, James R. Kingsley, Attorney, Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood, Charles V. R. Marsh, Ernest L. Hicks and Frank A. Eickhoff, all of the City of New York, State of New York, be and each of them is, hereby appointed Attorney-in-Fact of this Company and empowered to execute and deliver and attach the

"seal of the Company to any and all bonds or undertakings for
 "or on behalf of this Company, in its business of guaranteeing the
 "fidelity of persons holding places of public or private trust and
 "the performance of contracts other than insurance policies, and
 "executing or guaranteeing bonds or undertakings required or per-
 "mitted in all actions or proceedings, or by law required, permitted
 "or allowed.

"Such bonds or undertakings to be executed for the Company by
 "any one of the said Henry B. Platt, James R. Kingsley, Frank H.
 "Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood,
 "Charles V. R. Marsh, Ernest L. Hicks or Frank A. Eickhoff, and
 "to be attested in every instance by one other of the said Attorneys-
 "in-Fact, as occasion may require."

COUNTY OF NEW YORK, ss:

I, James R. Kingsley, Attorney in Fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 6th day of March, 1912.

[SEAL.]

JAMES R. KINGSLEY,
 Attorney-in-Fact.

Fidelity and Deposit Company of Maryland.

Statement of December 31, 1911.

Resources.

Real Estate (Fidelity Building and 210-212-214 North Charles Street, and 10 West Lexington Street)	\$2,129,946 28
U. S. Government Bonds	175,750 00
British Consols	206,648 00
State and Municipal Bonds	1,091,100 00
Street Railway Bonds	213,100 00
Railroad Car Trust and other Bonds	880,000 00
Bank and other Stocks	1,547,427 00
Loaned to National Banks (Secured by Collateral), U. S. Government Bonds	104,600 00
Premiums in course of collection (Agents)	845,972 79
Premiums in course of collection (Home Office)	23,928 42
Cash in Office and in Banks	838,848 48
Advance on Contracts (Secured)	275,679 60
Total	\$8,133,000 57

Liabilities.

Capital Stock	\$2,000,000 00
Premium Reserve Requirement.....	1,922,410 63
Reserve for Claims Adjusted (Checks out).....	5,251 90
Reserve for Contingent Claims (Surety).....	685,948 38
Reserve for Contingent Claims (Casualty).....	203,268 28
Reserve for Taxes on Premiums (Payable in 1912) ..	75,000 00
Reserve for Expenses in Transit.....	10,000 00
Contingent Reserve (Surety).....	50,678 65
Contingent Reserve (Casualty).....	119,464 56
Commissions due Agents on Premiums in course of Collection	224,451 76
Premiums due other Companies for Reinsurance..	18,045 01
Surplus	2,818,481 42
Total.....	\$8,133,000 57

County of New York, ss:

STATE OF NEW YORK,

James R. Kingsley, being duly sworn, says that he is the Attorney in Fact of the Fidelity and Deposit Company of Maryland, that the foregoing is a true and correct statement of the financial condition of said Company, as of December 31, 1911, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 6th day of March, 1912.

[SEAL.]

ERNEST L. HICKS,

Notary Public, New York County, No. 57.

376 (Endorsed:) U. S. Circuit Court of Appeals for Second Circuit. Sir Charles W. Cayser, et al., Plaintiffs-in-error, Defendants below, against Hugo Adelberto Thomsen, et al., Defendants-in-error, Plaintiffs-below. Bond on Writ of Error. I approve of the within Bond and of the sufficiency of the surety therein. Dated March 15, 1912, E. Henry Lacombe. Fidelity and Deposit Company of Maryland. 2 Rector Street, New York. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 15, 1912. William Parkin, Clerk.

377 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 376 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Union Castle Mail Steamship Company, Ltd., et al.

against Hugo Adelberto Thomsen et al. as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 21st day of March in the year of our Lord One Thousand Nine Hundred and twelve and of the Independence of the said United States the One Hundred and thirty-sixth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

378 *Writ of Error from Supreme Court to Circuit Court of Appeals.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between Hugo Adelberto Thomsen, Gustave A. Feddersen, Heindrich Johannes Riedel and Edward H. Muller, composing the firm of Thomsen & Company, defendants in error, and Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur B. D. Cayser, Hugh Gibb, John Joss, G. T. Portlock and John Percival, composing the firm of Cayser, Irvine & Company, Herbert Barber and James Barber, composing the firm of Barber & Company; Edward N. Norton and Skeffington S. Norton, composing the firm of Norton & Son, plaintiffs in error, a manifest error appears to have happened, to the damage of the said defendants in error, Hugo Adelberto Thomsen, Gustave A. Feddersen, Hendrich

379 Johannes Riedel and Edward H. Muller, composing the firm of Thomsen & Company, as by its complaint it appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Hon. Edward D. White, Chief Justice of the said

Supreme Court, the 15th day of March, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court
of Appeals, Second Circuit.

March 15th, 1912.

380 [Endorsed:] United States Supreme Court. Hugo Adelberto Thomsen, et al., Plaintiffs, against Sir Charles W. Cayser, et al., Defendants. Original. Writ of error from Supreme Court to Circuit Court of Appeals. Lorenzo Ullo, Attorney for Plaintiff, Office & P. O. Address, 29 Broadway, Borough of Manhattan, New York City. Copy received March 20th, 1912. J. Parker Kirlin, Attorney for Defendant. Received Mar. 20, 1912. Convers & Kirlin. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 20, 1912. William Parkin, Clerk.

381

Citation.

UNITED STATES OF AMERICA, ss:

To Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, G. T. Portlock, and John Percival, Composing the Firm of Cayser, Irvine & Company; Herbert Barber and James Barber, Composing the Firm of Barber & Company; Edward N. Norton and Skeffington S. Norton, Composing the Firm of Norton & Son:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit, wherein Hugo Adelberto Thomsen, Gustave A. Federson, Heindrich Johannes Riedel and Edward H. Muller, composing the firm of Thomsen & Company are defendants in error and you are plaintiffs in error to show cause, if any there be, why the judgment rendered against the said defendants in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. E. Henry Lacombe, United States Circuit Judge, this 15th day of March nineteen hundred and twelve.

E. HENRY LACOMBE,

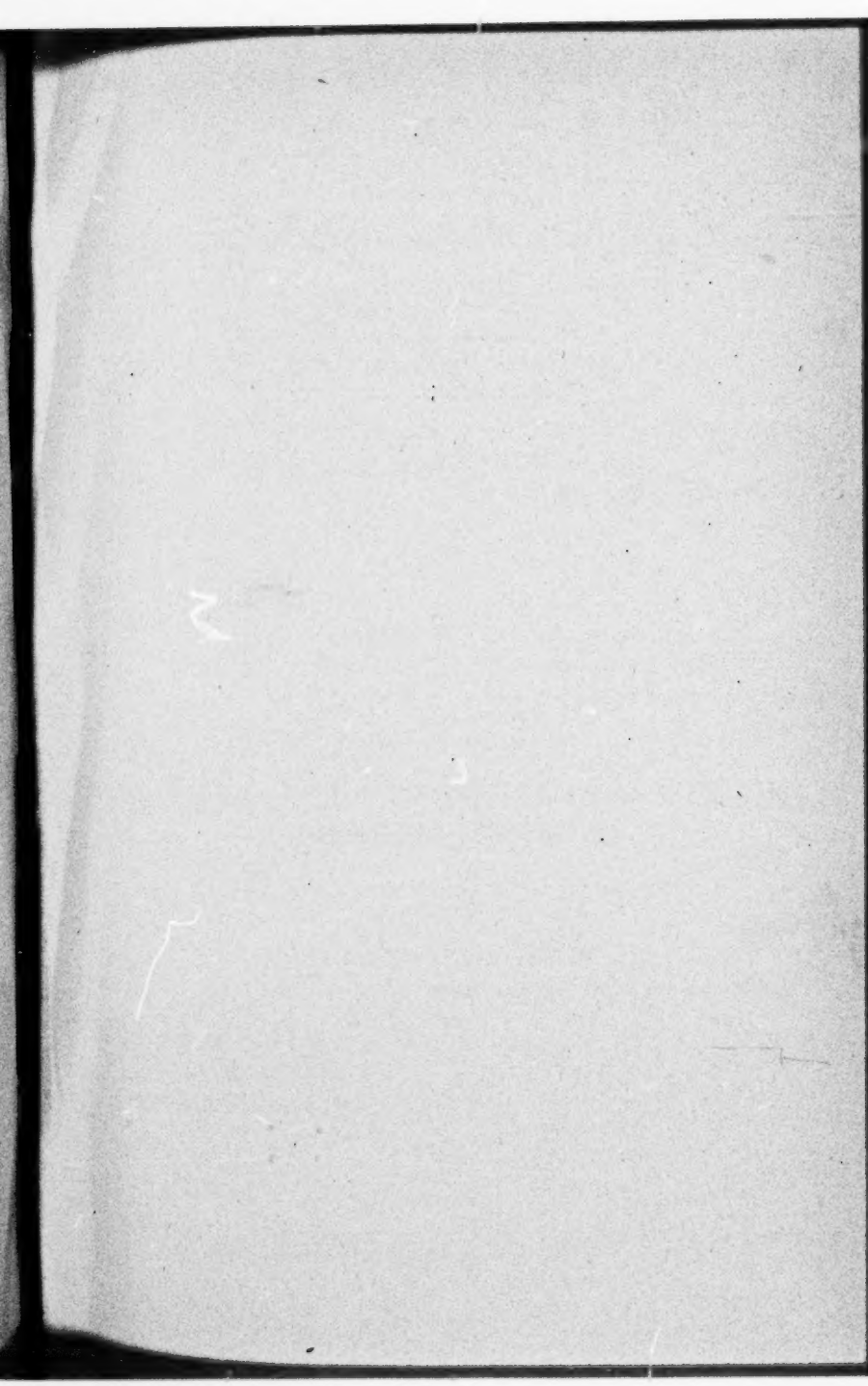
U. S. C. J.

382 On this — day of —, 1912, personally appeared before me the subscriber — and makes oath that he delivered a true copy of the within Citation to J. Parker Kirlin, one of the attorneys of record for the said plaintiffs in error mentioned in the within citation.

Sworn to and Subscribed the — day of —, 1912.

383 [Endorsed:] U. S. Circuit Court of Appeals for the Second Circuit. Sir Charles Cayser, et al., Plaintiffs in Error, against Hugo Adelberto Thomsen, et al., Defendants in Error. Citation. Lorenzo Ullo, Attorney for D'f's in Error. Office & P. O. Address, 29 Broadway, Borough of Manhattan, New York City. Copy received March 20, 1912. J. Parker Kirlin, Attorney for Defendant. Received Mar. 20, 1912. Convers & Kirlin. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 20, 1912. William Parkin, Clerk.

Endorsed on cover: File No. 23,162. U. S. Circuit Court Appeals, 2d Circuit. Term No. 231. Hugo Adelberto Thomsen, Gustave A. Federson, Hendrich Johannes Riedel, and Edward H. Muller, composing the firm of Thomsen & Company, plaintiffs in error, vs. Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, et al., composing the firm of Cayser, Irvine & Company, et al. Filed April 16th, 1912. File No. 23,162.





U. S. SUP. CT. BLDG., D. C.
FILED

APR 22 1914

JAMES D. MAHER
CLERK

Supreme Court of the United States.

No. ~~987~~ ²
OCTOBER TERM, 191~~3~~⁶

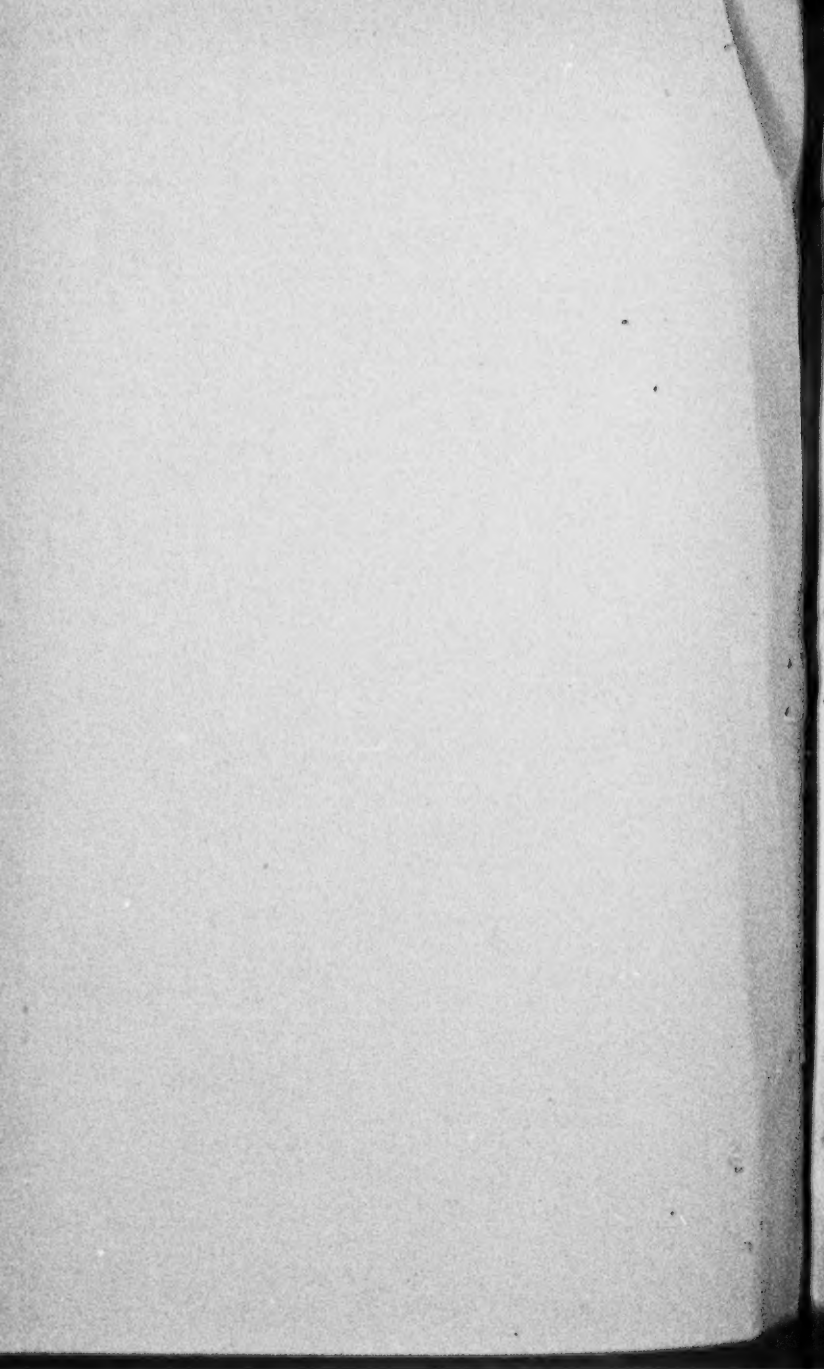
HUGO ADELBERTO THOMSEN *et al.*,
Plaintiffs-in-Error
(*Plaintiffs below*),
vs.

SIR CHARLES W. CAYSER *et al.*,
Defendants-in-Error
(*Defendants below*).

BRIEF IN BEHALF OF DEFENDANTS-IN-ERROR
(DEFENDANTS BELOW).

CONVERS & KIRLIN,
Attorneys for Defendants-in-Error.

J. PARKER KIRLIN,
THOMAS THACHER,
CHARLES R. HICKOX,
Counsel.



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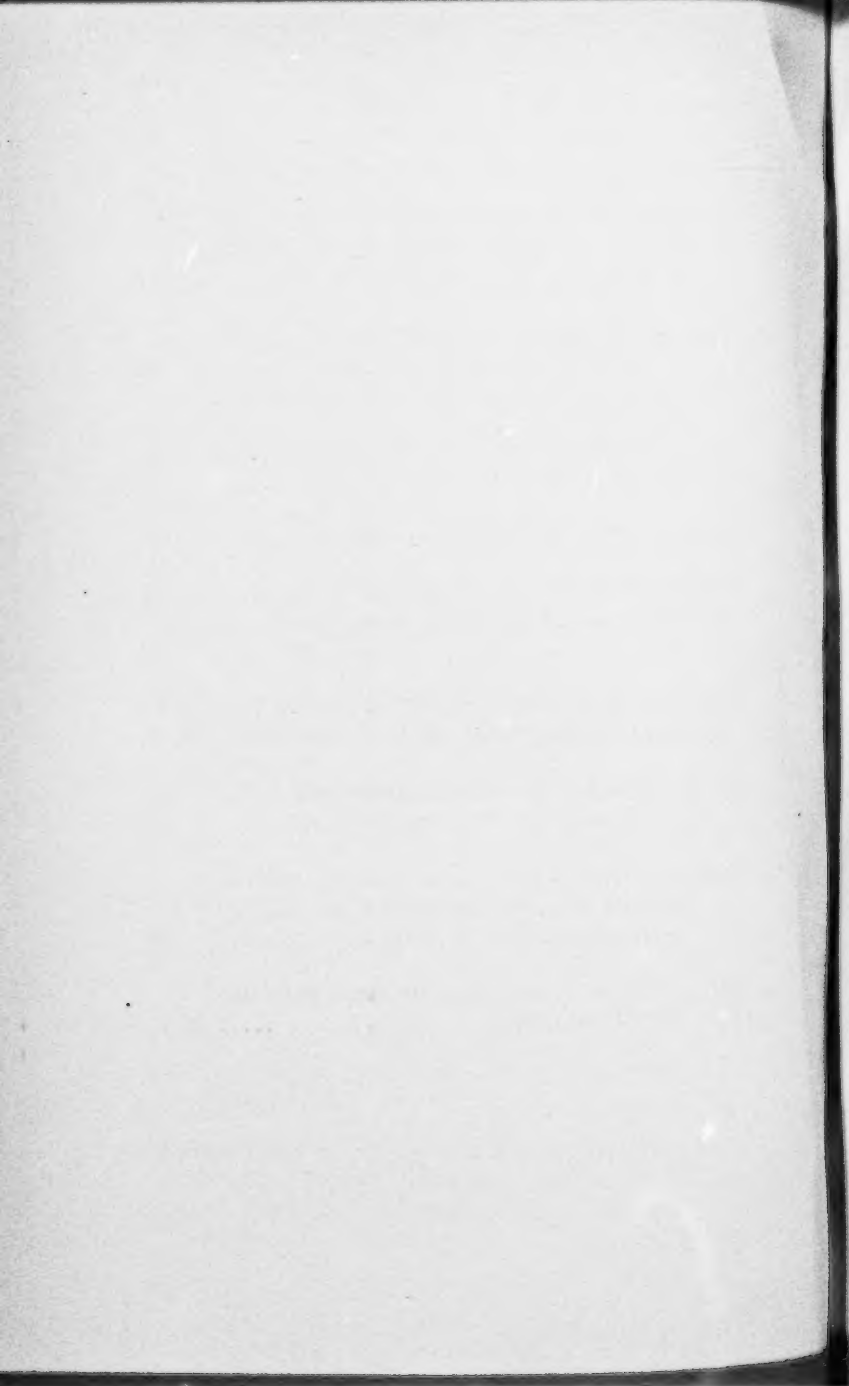
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Supreme Court of the United States.

HUGO ADELBERTO THOMSEN,
et al.,

Plaintiffs in Error,
Plaintiffs below,

AGAINST

SIR CHARLES W. CAYSER *et al.*,
Defendants in Error,
Defendants below.

No. 231.
October Term
1913.

**BRIEF IN BEHALF OF DEFENDANTS
IN ERROR, DEFENDANTS BELOW.**

Statement.

This is a writ of error (p. 220) taken by the plaintiffs to review a judgment of the Circuit Court of Appeals of the Second Circuit, dated November 16, 1911 (p. 211), reversing a judgment for the plaintiffs entered April 28, 1909, in the Circuit Court, District of New York, in an action at law, for \$25,310.90 (p. 43) and directing the dismissal of the complaint.

The action was brought under Section 7 of the Anti-Trust Act of 1890 to recover treble damages for alleged injury to the plaintiffs in their business or property by reason of an alleged combination or conspiracy claimed to be forbidden or declared illegal by that act.

The action was first tried before Hon. Charles M. Hough, District Judge, and a jury, and judgment was entered dismissing the complaint, Judge Hough being of the opinion that if an illegal combination was shown, what the plaintiffs by their complaint and by their statements on the stand asserted as injury was not injury by reason of such combination (149 Fed. Rep., 933). This judgment, being brought by the plaintiffs on writ of error to the Circuit Court of Appeals of the Second Circuit, was reversed and a new trial was ordered (166 Fed. Rep., 251). The new trial was had before Hon. John R. Hazel and a jury, and resulted in a judgment for the plaintiffs for \$25,310.90. This latter judgment, being brought to the said Circuit Court of Appeals by the defendants by writ of error, was reversed and a new trial was ordered (p. 206; Opinions, pp. 203-206). The mandate was sent down, but was afterwards recalled on the application of the plaintiffs for re-hearing (p. 207), and upon re-hearing plaintiffs made known to the Court that they preferred, instead of a decision granting a new trial, a decision reversing the judgment and directing a dismissal of the complaint (pp. 210-11). The Circuit Court of Appeals thereupon ordered that its previous order be vacated and that the judgment of the Circuit Court in favor of the plaintiffs be reversed and that the cause be remanded to the Circuit Court with instructions to enter an order dismissing the complaint (p. 211).

It is this judgment of the Circuit Court of Appeals which the plaintiffs now seek to have reviewed by this Court (p. 212 *et seq.*).

The fact that the Circuit Court of Appeals, upon reversing the judgment, instead of ordering a new trial directed dismissal of the complaint, is not open to criticism here for the reason that this was

done upon the request of the plaintiffs. If this request does not prevent any review of that judgment, if it does not in itself require an affirmance, it must bar the plaintiffs from criticising the action of the Circuit Court of Appeals in directing a dismissal instead of a new trial; and the question here is: Was the Circuit Court of Appeals right in its decision that the judgment of the Circuit Court should be reversed? If it was, the judgment appealed from must be affirmed. If it was right in reversing the judgment, the plaintiffs must be deemed to have agreed, and to be estopped from disputing, that the judgment appealed from was wholly right.

This Court has before it the same record as the Circuit Court of Appeals had, (with additions) including all the exceptions and the assignment of errors, of the defendants. If it shall appear to this Court that the judgment of the Circuit Court should have been reversed for any of the reasons presented by these exceptions, the judgment appealed from should be affirmed.

The defendants' assignment of errors on appeal to the Circuit Court of Appeals is on pages 192-200 of the record. The leading errors assigned are stated on page 21, *post*.

The Parties.

The plaintiffs are, as the complaint alleges (p. 6), merchants doing business in New York City, and engaged in trade and commerce between the port of New York and South African and other ports.

The defendants when the last trial began were (pp. 6, 7) two British corporations, namely, The Union Castle Mail Steamship Company, Ltd., and Bucknall Steamship Lines, Limited, the firm of

Cayser, Irvine & Company, and the firm of Donald Currie & Company, all "doing business as common carriers of merchandise, among others, between the port of New York and South African ports"; and also Barber & Company, agents at New York of said The Union Castle Steamship Company, Ltd., and of said Cayser, Irvine & Company, and also Norton & Sons, agents at New York of said Bucknall Steamship Lines, Limited, and of said Donald Currie & Company.

There were at the beginning, other defendants, namely, Deutsche Dampschiffahrts Gesellschaft Hansa, a German corporation, also, as alleged, "doing business as common carriers of merchandise, among others, between the port of New York and South African ports," which may be called the "Hansa Company," and Funch, Edye & Company, its agents in New York (p. 7). But at the first trial the action as against these defendants was discontinued (pp. 49, 50).

In the course of the second trial three other principals were dismissed from the case by the action of the Court. The Union Castle Mail Steamship Company and the Bucknall Steamship Lines, Limited, were dismissed from the case on the ground that they were corporations that had been organized subsequently to the alleged conspiracy (p. 127). At a later stage in the proceedings the complaint was dismissed as against the firm of Donald Currie & Company (p. 153). It appeared that two members of the firm had died before the trial, and there was no evidence to show who the various members of the firm were.

That left in the case as defendants the firm of Cayser, Irvine & Co., shipowners or managers, the firm of Barber & Co., who had acted as agents for Cayser, Irvine & Co., and also the firm of Norton & Son, who had acted as agents for the defendant Bucknall Steamship Lines, Ltd., and for the defendant firm of Donald Currie & Company.

The Substance of the Complaint and the Issues.

At all the times mentioned in the complaint, so it is alleged, the original defendants other than the agents, were owners and charterers of steamships plying and intended to ply between the port of New York and ports in South Africa, offering to carry for hire as common carriers merchandise intended for transportation between said ports (p. 7).

Prior to December, 1898, as alleged, the original defendants, except the Hansa Company and its agents, entered into a contract or agreement, and formed an illegal combination and conspiracy among themselves in restraint of trade and commerce among the several States of the United States and with foreign nations in violation of the statutes of the United States in such case made and provided, and combined and conspired and formed a scheme or traffic agreement among themselves for their gain and profit for the unlawful purpose of suppressing competition and of securing and maintaining a monopoly of the carrying trade and commerce between the ports of the United States and South African ports, in which said scheme or traffic agreement they agreed to make a certain discrimination in the rates of freight to be charged, which was calculated to coerce and prevent the plaintiffs having occasion to employ common carriers between the port of New York and South African ports, and all other shippers and merchants similarly situated, from employing such agencies and facilities of transportation as might be offered to them by other common carriers, and to restrain all other common carriers from serving the public between said ports; and in order to carry out said scheme and conspiracy and in furtherance of the same said defend-

ants, other than the Hansa Company and its agents, announced to the merchant public, that they would thereafter be united and be known under the name or style of "The South African Steam Lines," and thereupon issued and distributed among merchants trading in this port with South African ports, plaintiffs included, a circular, Exhibit A, annexed to the complaint (pp. 7, 8).

We state all this almost in the very words of paragraph eleventh of the complaint. It is obvious that there is no allegation of fact, such as the Court can regard, except that by concerted action the defendants, other than the Hansa Company and its agents, issued to merchants as aforesaid the circular, Exhibit A. All else is mere conclusion.

Paragraphs twelfth and thirteenth add no facts. The circular speaks for itself.

There is no allegation, so far, that anything whatever was done by anyone, except the issue of this circular, Exhibit A, until 1901.

Exhibit A is as follows:

Exhibit "A."

THE SOUTH AFRICAN STEAM LINES.

NOTICE TO SHIPPERS IN THE UNITED STATES.

COMMISSION IN RESPECT OF SHIPMENTS BY STEAM AND SAILING VESSELS.

LONDON, 31ST DECEMBER, 1898.

1. Shippers to all ports of the Cape Colony and of Natal, and to Delagoa Bay, are hereby informed that until further notice, and subject to the conditions and terms set out herein, each of the undernamed Lines will pay Shippers by their Line a Commission of ten per cent., calculated upon the net amount of freight at tariff rates received by such Line from such Shippers on their ship-

ments from the United States to South Africa.

2. The said Commission to be computed every six months up to the 31st January and 31st July in each year, and to be payable nine months after such respective dates to those Shippers only who, until the date at which the Commission shall become payable, shall have shipped exclusively by vessels despatched by the undernamed Lines respectively from the United States to ports of the Cape Colony, Natal and Delagoa Bay, provided that such Shippers, either as Principals or as Agents, have not directly or indirectly made or been interested in any shipments to any of the aforesaid ports by vessels other than those despatched by the undernamed, and also provided that the Statement of Claim for such Commission shall be made in the annexed form, within twelve months of the date of shipment, to the Line which shall have carried the goods in respect of which the Commission is claimed.

3. The above Commission is not payable on the goods of any Consignee who directly or indirectly imports goods by vessels other than those despatched by the undernamed Lines.

AMERICAN AND AFRICAN STEAMSHIP LINE.
UNION CLAN LINE.

All previous notices to shippers or consignees with reference to returns on freight are cancelled.

Note—The above Commission will be payable to the Shippers whose names appear on the Bills of Lading, or to their Order.

[Then follows form for statement of claim for Commission.]

About the middle of 1901, as alleged in the fourteenth paragraph (p. 9) the Hansa Company and its agents offered to transport merchandise to South African ports at reasonable rates, lower than those "imposed" by said other defendants, but thereupon said other defendants, for the purpose of avoiding and suppressing such competition, requested and

accepted the Hansa Company and its agents to become part of the scheme and combination aforesaid, and for such purpose all of the original defendants agreed to maintain and continue together the monopoly of the transportation trade to South African ports as established as aforesaid, and in furtherance of the said purpose, issued on or about December 1, 1901, to all exporters in the South African trade a circular, Exhibit B, annexed to the complaint.

We state this almost in the very words of paragraph fourteenth. It is obvious that there is here no allegation of fact except that the Hansa Company and its agents having offered to carry freight at lower rates than "those imposed by" the other defendants, all the defendants by concerted action issued the circular, Exhibit B.

Exhibit B is substantially in the same form as Ex. A *ante*, page 6, except that the date is November 1, 1901; and the signatures are:

DONALD CURRIE & Co.	}	hitherto working as American and African Steamship Line.
BUCKNALL STEAM- SHIP LINES, LTD.		
UNION-CASTLE MAIL STEAMSHIP COMPANY, LTD.	}	hitherto working as Union Clan Line.
CAYSER, IRVINE & Co.		

HANSA STEAM NAVIGATION CO., OF BREMEN.

Thereafter, as alleged in the fifteenth paragraph (p. 10), the defendants adopted a verbal agreement, that "loyal" consignees could collect, if shippers were not loyal.

Said original defendants, as alleged in paragraph sixteenth (p. 10), did not dispatch steamers to South African ports at stated and regular days of sailing, but placed steamers on berth to receive general cargo only at such times and for such ports in

South Africa as they deemed best for their own private gain and profit.

The whole case up to this point, that is up to paragraph seventeenth, as to what defendants, or any of them did is, that the defendants other than the Hansa Company and its agents by concerted action issued the circular, Exhibit A, in 1898, and all the defendants named in the complaint by concerted action issued the circular, Exhibit B, in December, 1901, which was afterwards verbally amended in the direction of liberality to consignees, and that steamers were not dispatched by defendants at stated and regular days.

Up to this point, that is in the first sixteen paragraphs of the complaint, there is no allegation as to any business done by the defendants or either of them or as to anything done or left undone by the plaintiffs.

The Seventeenth paragraph of the complaint (p. 10), as amended at the trial (p. 53), reads as follows:

"That by reason of the monopoly so created and maintained by the defendants herein, *except the Hansa line and Funch, Edye & Company, prior to November, 1901, and by said defendants together with the Hansa line and Funch, Edye & Company ever since November, 1901*, the merchants in the United States doing business in the exporting trade to South African ports, among whom are these complainants, have been restrained from trading freely with said ports, through such carrier or carriers as offer the best and most reasonable facilities and inducements, but have been compelled to submit to the hardships and inconvenience of the monopoly created and maintained by the said defendants as aforesaid, and to pay the higher rates of freight as aforesaid; and by reason

of their compulsory submission to the monopoly so unreasonably, unwarrantably and unlawfully created and maintained by the said defendants, as aforesaid, the same have been enabled to compel payments from the various shippers to South African ports, among whom are the complainants, of large amounts of freight paid at the time of shipment on the basis of the higher unreasonable and unlawful rates fixed by the said defendants, as above set forth, and to such an extent as to leave at the present time in defendants' possession collectively, as complainants are informed and verily believe, about the sum of one million and a half of dollars, or more, representing the extortionate amounts received in excess and made up by the difference between the higher rate exacted and collected at the time of shipment as above set forth, and the lower rates, alleged by the defendants as aforesaid to be fair and reasonable rates, and out of such amount the sum of £1,112 7s. 11d, has been forcibly so received, exacted and extorted from the complainants herein by the said defendants."

The words "by reason of the monopoly so created and maintained," &c., cannot be taken as adding anything further to the preceding allegations as to the existence of any "monopoly."

Nor can the conclusions of this paragraph, without facts, be accepted as of any weight.

There is still nothing as to anything done after the issue of Exhibit B except the irrelevant allegations of paragraph sixteenth.

The Court could do little more than guess, from the complaint, what facts were back of the pleader's silence. It may guess that the plaintiffs shipped merchandise according to the terms of the circulars, paying or agreeing to pay the tariff rates therein referred to, with the understanding that, upon conditions therein stated, part of the moneys so paid would be refunded; that the total amount of the sums which they would have been entitled to receive, if they had complied with such conditions, beyond what they did

receive, was £1,112 7s. 11d; and that these sums they did not receive, because they did not comply with the conditions.

Paragraph Eighteenth (p. 11) alleges that since the spring of 1902 the Prince Line and the Houston Line have offered to carry merchandise from New York to South Africa for freight lower than that exacted by the defendants.

Paragraphs Nineteenth and Twentieth (p. 11) show what the defendants did to meet this competition. They increased, with respect to limited shipments on particular ships, the portion of freight money to be returned on conditions as stated in Exhibit B, issuing with respect to such ships circulars, of which Exhibit C and Exhibit D are samples, and with respect to such ships did business accordingly.

Exhibit C reads as follows:

Exhibit "C."

Copy of Circular issued by Messrs. Norton & Son, Agents, American & African Line,
Re Corfe Castle for Natal and East London.

NEW YORK, July 24th, 1902.

Dear Sirs.—Announcement is made to the trade that the S/S *Corfe Castle* is intended to be dispatched for the port of Port Natal, South Africa, on or about August 10th, with privilege of calling also at East London, and that freight room may be engaged at current tariff rates, subject to a return commission on goods shipped to Port Natal for an amount to be arranged (uniform to all qualifying shippers), which will be paid to all shippers here who can qualify for it by certifying that they have not made, nor been interested in, any shipments, directly or indirectly, between this date and thirty days after the departure of the vessel, by any steamer or steamers sailing to any port or

ports in South Africa, other than those dispatched by the undernamed Companies:

DONALD CURRIE & Co.	}	hitherto working as American & African Steamship Line.
BUCKNALL STEAM- SHIP LINES, Ltd.		
UNION-CASTLE MAIL STEAMSHIP Co., Ltd.	}	hitherto working as Union Clan-Line.
CAYSER, IRVINE & COMPANY		

HANSA STEAM NAVIGATION CO. OF BREMEN.

There will also be a special commission in an amount to be named on all goods shipped to East London, subject to the conditions above stated.

Freight must be paid at tariff rates. The above Commissions will be returned in cash on the presentation of the qualifying certificate thirty days after the steamer's departure. Any goods received on the steamer will be subject to the terms of this circular. Where a cash rebate is granted under this circular, the commission under the circular of April 18th, 1902, will only be paid on the net amount of freight retained by the steamer.

(signed) NORTON & SON,
Agents.

Exhibit D is a similar circular alleged to have been issued by Barber & Company with respect to another vessel.

The twenty-first paragraph (p. 12) alleges that defendants threatened to withhold and withheld the repayment of the so-called rebates from plaintiffs who had been "loyal shippers," but would not remain "loyal."

The twenty-second paragraph (p. 12) alleges that on two occasions plaintiffs offered to ship on defendants' steamers 1,000 tons of merchandise and 800 tons respectively, but the defendants would only allow them to ship at the lower rates (that is, under conditions entitling them to the larger rebates),

150 tons and 100 tons respectively, and required them to pay the higher rates (that is, ship under conditions calling for the smaller rebates) for the remainder, the rate charged, that is, the tariff rate, being higher than the opposition rates, and defendants threatened that if plaintiffs shipped by opposition lines, defendants would withhold the rebates upon previous shipments by them.

The twenty-third paragraph (p. 12) alleges nothing upon which any claim of injury to the plaintiffs can be claimed. The twenty-fourth and twenty-fifth paragraphs (pp. 12, 13) are mere conclusion; they state no facts.

The twenty-sixth paragraph (p. 13) reads as follows:

"TWENTY-SIXTH.—That by reason of the premises these complainants have been damaged in the sum of £1,112 7s. 11d., equal to \$5,560 for money paid in excess of the rates by defendants deemed to be reasonable, fair and profitable, and in the further sum of ten thousand dollars for loss and damage sustained by reason of the restraint of their business and trade as aforesaid."

Although the suit was discontinued at the first trial as against the Hansa Line and its agents, the complaint was not then amended (pp. 51, 52).

None of the allegations of the complaint, from Paragraph Eleventh to the end, were admitted except that Cayser, Irvine & Company authorized, and Barber & Company as their agents distributed, the circulars Exhibits A and B among merchants trading in New York and South African ports, and that Norton & Company, as agents for Donald Currie & Company, likewise distributed such circulars; and that Barber & Company, as agents, likewise distributed Exhibit D, and Norton and Son, as agents, likewise distributed Exhibit C; and that payments for rebates claimed by the plaintiff were

refused. Cayser, Irvine & Company also admitted, in reference to Paragraph Sixteenth of the Complaint, that they had not at regular intervals placed steamships owned by them, or chartered steamships, on the berth to receive general cargo from the United States to South African ports.

See answer of Cayser, Irvine & Company, page 23; answer of Barber & Company, page 33; and answer of Norton & Company, page 37.

Amendment of Complaint.

On the second trial, for which the parties prepared on the same pleadings that were used in the former trial, the plaintiffs offered evidence, and then in the course of the trial, asked, and were granted, leave to amend their complaint, by alleging a different cause of action (pp. 53, 54).

The amendment related only to the seventeenth paragraph of the complaint (*Ante*, p. 9). In that paragraph it was originally alleged that "by reason of the monopoly so created and maintained by all the defendants herein, the merchants in the United States doing business in the exporting trade to South African ports, among whom are these complainants, have been restrained from trading freely with said ports, etc., etc." This is changed to read that by reason of the monopoly so created and maintained by the defendants herein *except the Hansa Line and Funch, Edye & Co., prior to November, 1901, and by said defendants together with the Hansa Line and Funch, Edye & Co. ever since November, 1901, the merchants of the United States doing business, etc.* Later in the same paragraph minor changes to conform were made.

The defendants excepted to the ruling of the Court permitting this amendment and asked leave to withdraw a juror, so that the new charge might be met by the defendants before they were brought

to trial. Their request was denied, and exception was taken (p. 52).

The Proofs.

The plaintiffs are a firm of brokers or merchants at New York where two of the partners, Mr. Thomsen and Mr. Riedel, are resident (p. 95). Both partners were witnesses at the first trial (p. 95). They were not called at the second trial. Whether or not this was because of their somewhat improvident testimony on the nature and extent of the damages they claimed to have sustained (pp. 111-14), is perhaps not certain. On this trial the plaintiffs put forward Sulima an employee, who, as he said, had charge of their South African business (p. 84).

The plaintiffs had been in business more than 65 years (p. 97) but had never traded with South Africa till April, 1899 (pp. 85, 97). This was after the circulars involved in this controversy had been issued. The first circular was dated December 31, 1898 (p. 169). Sulima claims, though, that the circulars had not been seen before the South Africa business had been started (p. 87).

However that may be, the first shipment the plaintiffs made was in April, 1899, and was upon one of the steamers operated by some of the original defendants. There were no other vessels trading to South Africa at that time (p. 85).

All that appears of the circumstances under which the shipments were made is contained in Sulima's testimony. He says that they were all made or intended to be made on the terms of the circular (Ex. A or Ex. B, p. 87).

These circulars announced that each of the signatory steamship lines would pay to shippers by their line "a commission of ten per cent., calculated

upon the net amount of freight at tariff rates received by such line from such shippers." But the commission was to be computed for periods of six months ending on January 31 and July 31 of each year, and was to be paid nine months thereafter to those shippers only who by that time had shipped exclusively by the signatory lines (pp. 169, 170).

The application for the return commission had to be made on the printed form that accompanied the circular, and contained the statement that the applicant had not shipped by any other line and had complied with the terms and conditions of the circular (pp. 172-4). These applications were filled out by the plaintiffs after 1902, though in fact they had made shipments by other lines (*Sulima*, pp. 99, 100).

Sulima said (p. 98).

"Whenever we made a shipment, in respect of which we made a freight payment, we got a bill of lading. That is, each shipment was covered by a written contract with the ship; and that bill of lading in each instance contained on its face the contract covering the amount of the net freight and the 10 per cent. primage. We had those bills of lading in every instance, prepaying freight."

Prior to the receipt of the bill of lading, however, the plaintiffs gave the agents a due bill expressing the amount of freight payable a certain number of days after delivery (pp. 64, 65, 98, 99).

"That was a promise to pay the amount stated on the face of the bill of lading" (*Sulima*, p. 99).

When the time arrived the shippers would pay the due bills which had been exchanged for bills of lading (pp. 64, 65). If there were several shipments on the same vessel the plaintiff would take up all the due bills in one payment (*Sulima*, p. 99).

On contracts thus made, on the terms of those due bills and circulars, the plaintiffs made various shipments from time to time, beginning on April 15, 1899, and ending on September 30, 1902. A detailed statement showing the dates of the shipments, the steamers and the freight, is given at pages 182, 188. The statement apparently comprises only the shipments on which the return commission was refused (*Sulima*, pp. 90, 91). Mr. Sulima speaks of shipments as late as June, 1903 (p. 90), and says that the total freight paid amounted to about \$180,000. The detailed statement, however, does not show any shipments subsequent to September 30, 1902.

On the shipments so made by the plaintiffs, the return commissions that would be payable if the terms of the circulars were carried out by the plaintiffs, amounted to \$17,911.75, according to Sulima (p. 90). He said that the plaintiffs had received about \$12,000 of that sum, but still claim about \$5,000 (p. 90).

The reason stated to the plaintiffs after 1902, why the balance of the return commissions was unpaid, was, that either the shippers or the consignees had failed to live up to the terms of the circulars, and had shipped goods by opposition lines (*Sulima*, pp. 90, 91). At this juncture the plaintiffs claim that they took advice of counsel to ascertain whether or not the return commissions were collectible (*Sulima*, pp. 90, 91).

The proof offered by the plaintiffs to substantiate their claim in the complaint that the defendants had formed a combination and conspiracy in violation of the statute, was exceedingly meagre.

There is not in the record any direct proof whatever of the terms of any conference or agreement participated in by any of the defendants. All that appears is that certain steamship owners consisting

of firms, the identity of whose members is not established, operated steamers in the trade from New York to South African ports without competing with one another (*Norton*, p. 78). This circumstance was shown in the testimony of Mr. Norton, one of the defendants who was called on behalf of the plaintiffs. Mr. Norton assumes that the dispatching of vessels by their owners at uniform rates without competing with one another must have been the result of some agreement or arrangement (p. 48).

Mr. Norton stated that between 1899 and 1901 certain steamship owners, as represented by his firm and Barber & Company, "conferred together to the end of maintaining the service and agreeing on rates of freight; fixing rates of freight to work the business. As far as I know they also conferred together relative to dealing with tramp steamers when they entered into competition" (p. 59). He stated later, however, that "I have no personal knowledge of those matters myself * * * all I know is what I got instructions to carry out" (p. 65).

There is nothing to show what the terms of such a conference were.

It appears that under date of December 31st, 1898, the circular, Exhibit A (p. 169), above referred to, was issued, signed by the American & African Steamship Line and the Union Clan Line (pp. 169, 176).

The American & African Steamship Line was a trade name under which the different steamship owners at different times worked. Prior to November 15, 1900, Bucknall Brothers had been one of the parties trading under that name. After that date, the Bucknall Steamship Line was incorporated, taking in, among other things, the business of Bucknall Brothers (p. 46). The firm of Donald Currie & Company also worked under the same name,

but it does not appear who the members of that firm were (p. 62).

Because of this failure of proof the complaint was dismissed as to the firm of Donald Currie & Company (p. 153). The Bucknall Steamship Lines had been eliminated from the case, as it did not come into existence as a corporation until 1900 (p. 127). Bucknall Brothers had never been made a party to the suit.

The other signatory to the circular was the Union Clan Line. That was a name under which the firm of Cayser, Irvine & Company did business part of the time (*Barber*, p. 67). The Union Castle Mail Steamship Company, Limited, also did business under that name part of the time (*Barber*, 368). Prior to 1899, however, these concerns had another organization, and it does not appear what that organization was (*Barber*, p. 68). The Union Castle Mail Steamship Company, Limited, was eliminated from the case, as it was not incorporated until 1900 (*Barber*, p. 72), this time being subsequent to the organization of the alleged conspiracy (p. 127).

So far as the firms of Norton & Son and Barber & Company are involved as agents, it appears that neither of them ever had any interest as principals in the vessels in the South African trade, nor in their earnings (*Norton*, p. 61). Each agent obtained a commission on the freight booked, and they never, at any time, signed any agreement or contract of any kind for the formation or method of operation of a service to South Africa during the period mentioned in the complaint (*Barber*, pp. 73, 81, 83, 134, 135, 141, 142; *Norton*, p. 63). The interests of the two agents were identical (*Barber*, p. 82).

It is a fact that during part of the time the agents pooled their commissions; that is, they divided equally between them the freights, irrespective of the lines on which the shipments were made

(*Barber*, p. 82). This, however, was not a matter that had anything whatever to do with the alleged conference or agreement in London.

The agents conferred as to the conditions of the market at New York, and notified London on the subject from time to time (*Norton*, p. 66). They replied to inquiries from London as to whether or not one person or another had shipped by opposition lines, but apparently did not volunteer such information (*Norton*, pp. 66, 67). The agents acted only under instructions from London (*Barber*, p. 83) and the conferences between the agents related only to the details of such instructions (*Barber*, p. 142). The agents would recommend whether more or less tonnage was needed and also give recommendations on the rates (p. 142). Mr. Barber was asked if the principals did not frequently adopt the recommendations, and he answered, "No, they did not, I am sorry to say" (p. 149).

The agents had nothing to say on the question of payments of the return commissions. The commissions were paid only on instructions from the principals in London after the return of the application of the shipper (pp. 58, 59) on the form annexed to the circular (p. 69). The agents paid whatever they were told to pay and charged the amounts to the principals (*Norton*, pp. 64, 65). The agents did not exercise any judgment or discretion as to the persons to whom the return commission should be paid (*Barber*, pp. 73, 74).

That in substance was all that the proofs showed as to the alleged combination or conspiracy.

The facts as to the reasonableness of the rates and certain items of damage claimed by the plaintiffs are dealt with later in this brief (see pp. 51-55); and see *post*, pages 33-36, as to the facts showing that the doings of the original defendants developed and promoted (instead of restraining) trade and commerce.

At the conclusion of the plaintiffs' case, various motions were made on specified grounds for the

dismissal of the complaint (pp. 117, 118). These were all denied except in so far as they dealt specifically with the Bucknall Steamship Lines, Ltd., and with the Union Castle Mail Steamship Company, Ltd., and as to them they were granted (p. 127).

These motions were renewed after the evidence was all in and were denied except that the complaint was dismissed as to Donald Currie & Company (p. 153). Several exceptions were taken to the Judge's charge and various requests to charge were made on behalf of the defendants which were denied and exceptions taken (pp. 162, 163, 166).

The jury then rendered a verdict "for the plaintiff in the sum of \$5,600 with interest" (p. 166). Counsel for the plaintiff stated that he did not understand just what that meant, and the foreman of the jury replied that, "the jury could not fix the date because they did not know when this was due and payable" (p. 166). The Court then suggested that the plaintiffs claimed to be entitled from the 9th day of June, 1903, and said to the jury, "What do you wish to do with reference to the claim of the plaintiffs in that regard?" (p. 167). The jury then stated, "We so find," or words to that effect and the Court interpreted the verdict as being for \$5,600 with interest from June 9th, 1903 (p. 167).

Errors of the Circuit Court.

The assignment of errors by the defendants in the Circuit Court of Appeals is found in full on pages 192 to 200 of the record.

Among the errors so assigned were the following:

Error in denying motions to dismiss as to Norton & Son at close of plaintiffs' case and at close of whole case (11th).

Error in refusing to direct verdict for all defendants (12th and 13th) and in refusing to direct verdict for Barber & Co. (14th).

Error in instructing the jury as matter of law that the defendants remaining in the case had in fact entered into a combination which was contrary to the statute, and in refusing to leave to the jury the question whether the defendants, including the agents, had entered into a combination unlawful under the Sherman act (15th).

Error in charging that agents became parties to an unlawful conspiracy by what they did in connection with the business of the conference in New York (19th).

Error in refusing to charge that a verdict could not be rendered based on no other injury than such as resulted from the contracts of shipment which plaintiffs entered into with the defendants, and the payments made thereon (21st and 22nd).

Error in refusing to charge that it was essential to any recovery on account of payments under contracts of shipment that it appear that the rates charged were unreasonably high and in excess of what the service was worth, having regard to the right to receive a fair profit (25th).

Error in refusing to charge that the burden of proof as to excessive rates was on the plaintiffs (31st).

Error in allowing amendment of the complaint and refusal to permit withdrawal of a juror therefrom (1st).

Other errors as to damages, &c.

As has already been said (pp. 2 and 3), if the Circuit Court of Appeals was right in holding that the judgment should be reversed and a new trial ordered, because of any of these errors, the judgment of reversal with direction to dismiss, which was substituted for its first judgment of reversal with order for new trial upon plaintiffs' request, should be affirmed.

FIRST POINT.

The action must find support in Section 7 of the Anti-Trust Act of 1890, or must wholly fail. It was necessary to establish a combination or conspiracy illegal under said act and also injury to the plaintiffs in their business or property by reason of such illegal combination or conspiracy.

The plaintiffs' counsel has heretofore now and then claimed that the complaint states a case good at common law. The claim is obviously unsound; but were it good, it would not avail, because the only thing which gives the federal courts jurisdiction is that the action is based upon a federal statute.

Said Section 7 reads as follows:

"Any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

If the plaintiffs failed to show an illegal combination or conspiracy, they, of course, failed wholly. The illegality of the combination or conspiracy must be based either on § 1 of the Act, as being "in restraint of trade or commerce * * *

with foreign nations," or on § 2 of the act, as *monopolizing* or as intended to *monopolize* "any part of the trade or commerce * * * with foreign nations." And, on the other hand, if the facts proved, within the allegations of the complaint, showed an illegal combination or conspiracy, the action equally failed, unless it appeared from such facts that the plaintiffs were injured in their business or property by reason of such combination or conspiracy.

SECOND POINT.

The judgment appealed from should be affirmed because the proofs, within the allegations of the complaint, fail to establish any combination or conspiracy in violation of the Anti-Trust Act.

If no such combination or conspiracy appears from the allegations of the complaint, that is, of course, sufficient to call for affirmance.

So, also, if those allegations of the complaint which were established by the proofs do not show such combination or conspiracy. This point is covered by the exceptions to the refusal to dismiss (p. 127), the refusal to direct a verdict for defendants (p. 153) and to the Judge's charge (p. 162 *et seq.*). He stated to the jury that an unlawful combination, such as the Sherman Act condemned, was fairly proven and instructed them accordingly. His charge was based upon the opinion of the Circuit Court of Appeals upon the first appeal, in which they laid down the proposition that a restraint of competition was necessarily

a restraint of trade or commerce (166 Fed. Rep., 251).

On the second appeal, decided after the decisions of this Court in the Tobacco Company case (221 U. S., 106) and the Standard Oil Company case (221 U. S., 1) the Circuit Court of Appeals, understanding that this Court had now decided such proposition to be unsound, reversed its former opinion.

The same view was taken in the opinion of the Circuit Court in the *Powder Trust case*, (188 Fed. Rep., 339), in which (p. 373), the Court said as follows:

"There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the Anti-Trust Act was passed, a definite legal signification. Not every combination in restraint of competition was, in a legal sense, in restraint of trade. Two men in the same town engaged in the same business as competitors may unite in a co-partnership, and thereafter, as between themselves, substitute co-operation for competition. Their combination restrains competition, and if their town is located near the line between two states, and each has been trading in both states, their combination restrains competition in interstate trade. But it does not necessarily follow that such restraint of competition is a restraint of interstate trade and commerce. The determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish such trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition without regard to their purpose or direct effect to restrain 'trade or commerce among the several states.'"

We understand, as the Circuit Court of Appeals did, that this Court has now in effect held that a restraint of competition does not necessarily operate as a restraint of trade within the meaning of the Anti-Trust Act, and this seems to us to be in accordance with the previous decisions of this Court.

It is true that in the Northern Securities Company case, 193 U. S., 197, 331, Mr. Justice Harlan stated various propositions as established by previous decisions, among others, the following:

“That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition, restrains instead of promotes trade and commerce.”

But it is obvious from the proposition next preceding that which we have quoted, that Mr. Justice Harlan had in mind competition “between otherwise competing railroads,” and moreover, the previous decisions speak for themselves.

The only previous decision upon which it seems that this quoted proposition could have been based is that in the Joint Traffic Association case (171 U. S., 505), which related to competition between railroads. It was argued that though the agreement before the Court restrained competition, it did not necessarily restrain trade or commerce, and this proposition was substantially assented to by Mr. Justice Peckham in his opinion. He says (p. 575):

“The material considerations, therefore, turn upon the effects of competition *upon the business of railroads*, whether they are *favorable to the commerce* in which the roads are engaged, or *unfavorable and in restraint of that commerce*.” (Italics are ours.)

The Court, as we read the opinion, assented to counsel's major premise, that a restraint of compe-

tion is not necessarily a restraint of trade or commerce, and is such only when the restraint of competition is unfavorable to trade or commerce.

In discussing the minor premise, Mr. Justice Peckham says (p. 577):

"The natural, direct and immediate effect of competition is, however, to lower rates and thereby to increase the demand for commodities, the supplying of which increases commerce, and an agreement, whose first and direct effect is to prevent this play of competition, *restrains* instead of *promoting* trade and commerce." (*Italics are ours.*)

It seems that the Court decided against the defendants in that case because it reached the conclusion that the agreement before it "*restrained* instead of *promoting* trade or commerce," or in other words that it was *unfavorable* to commerce; that the Court assented that the crucial question as to the legality of the agreement was: Does it restrain or promote trade and commerce? or, the same question in substance: Is it favorable or unfavorable to trade and commerce? The Court seems to have assented to Mr. Carter's position, stated in the report of his argument as follows: "That it [the agreement] is in fact in restraint of trade or commerce, must be shown before this action can be maintained."

We submit that there is nothing in the Joint Traffic Association case, especially when it is considered in the light of Mr. Justice Brewer's opinion in the Northern Securities Company case and of the later opinions of this Court, which is against the proposition, *that what promotes or is favorable to trade and commerce, does not restrain it within the meaning of the act.*

The history of the act shows a clear intent on the part of Congress not to condemn contracts and

combinations merely because they are in restraint of competition or merely because they operate to raise the cost of commodities to consumers. The Sherman Bill, S. 1 in the Fifty-First Congress, introduced December 4, 1889 (substantially the same as S. 3445 introduced in the Fiftieth Congress August 14, 1888), was directed against contracts or combinations *to prevent full and free competition*, or to advance the cost to the consumer. This bill was, on March 27th, 1890, referred to the Judiciary Committee of the Senate, which entirely redrew it. Restraint of competition and advance of prices were the subjects of the bill as it was on March 27th, 1890, but as redrawn, and as it became law, it made no mention of competition or advance of prices, but was directed against contracts, combinations and conspiracies *in restraint of trade or commerce*, and against monopolizing.

Once before a motion to refer the bill to the Judiciary Committee had been made, but it had been voted down. On March 27, 1890, it was so referred immediately upon the close of a forcible speech by Senator Platt, of Connecticut, to be found on pages 295-298, of said compilation of "Bills and Debates in Congress relating to Trusts," prepared by direction of the Attorney General in 1903, in which he denounced as false the assumption "that all competition is beneficent to the country and that every advance of price is an injury to the country."

When the bill as redrawn and passed by the Senate came up in the House the prohibition against contracts affecting competition was put back by an amendment, which the Senate concurred in with an amendment limiting its application to transportation. In conference the amendment of the House, as amended by the Senate, was approved; but the conference report was rejected, the House receded from its amendment, and the bill was finally passed as drawn by the Senate Judiciary Committee.

In the language of the act, read by itself or in

the light of its history, no justification can be found for holding that to be "in restraint of trade or commerce," whereby trade and commerce are not restrained, but are, on the contrary, developed and increased.

The intention of the act was expressed in its title: To protect trade and commerce. It looked to the development and increase of trade and commerce in the interest of the public, to the removal of obstacles to its growth and expansion. It seems like trifling with a large purpose to treat the act as if it was meant to make illegal every effort for the development of trade or commerce, however well calculated to the end in view, which involved any elimination of competition or any advance or maintenance of prices. It would seem that Congress realized that in the interest of trade and commerce, competition must sometimes be eliminated, and prices must sometimes be advanced or maintained, as Senator Platt so vigorously contended? That here and there competition might be eliminated was of no consequence; the purpose was to protect trade or commerce, not for the benefit of one individual and another, but in the public interest; and Congress prohibited only such *contracts and combinations as prejudiced the public interests by unduly restricting competition or unduly obstructing the course of trade.*

We respectfully call the attention of the Court to its language in the Tobacco Company case (221 U. S., 179) as follows:

"Applying the rule of reason to the construction of the statute, it was held in the Standard Oil case that, as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated *to the prejudice of the public interests* by unduly restricting competi-

tion, or *unduly obstructing the due course of trade* or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, &c., *injuriously restrained trade*, that the words as used in the statute were designed to have and did have but a like significance." (Italics are ours.)

And also, to its language in *Nash v. U. S.*, 229 U. S., 373, 376, in which, speaking of the Tobacco and Standard Oil cases, it said:

"Those cases may be taken to have established that only such contracts and combinations are within the Act, as, by reason of intent or the inherent nature of the contemplated acts, *prejudice the public interests* by unduly restricting competition or unduly obstructing the course of trade." (Italics are ours.)

We find nothing contrary to our proposition in *Strauss v. Am. Publishers Ass.*, 231 U. S., 222, in which a contract between publishers to maintain retail prices was condemned because it went beyond any fair and legal agreement to protect prices and trade as among the parties thereto.

In this connection, we would call attention to the decision of the Privy Council, in July, 1913, in *Attorney-General v. The Adelaide Steamship Company, Ltd., and others* (Privy Council, 1913, A. C., 781), and the opinion in support of that decision, which dealt with the meaning and application of the words "*to the detriment of the public*" in what may be called the Anti-Trust Act of Australia.

As we read the opinions of this Court, it has, by applying the rule of reason, found in the Sherman Act what is equivalent to the words "*to the detriment of the public*" in the Australian Act.

We venture to submit that if this Court had come to any other conclusion, or, in other words, had

found that the Act prohibited anything which did not "prejudice the public interests" or anything which was not to the detriment of the public," it could hardly have accepted the Act as valid under the Constitution. It is in the public interests only that justification can be found for this legislation. To interfere with business freedom, including freedom to contract, is not within the power to regulate commerce except so far as may be necessary, to protect the public interests or to prevent what is to the detriment of the public.

If we are right in thinking that the Sherman Act condemns only contracts, combinations and conspiracies which are prejudicial to the public interest, the question arising in this case becomes substantially the same as that which arose in the *Mogul Steamship Company* case (1892 A. C., 25), although the courts there dealt not with any statute, but with the common law.

The application of the reasoning in the opinions in the *Mogul Steamship Company* case is obvious since they related to a very similar arrangement to that which is charged here.

Another English case,—a very late one—and the opinion of the Lord Chancellor in that case, are very pertinent here. The case is *The North-Western Salt Company (Limited) v. The Electrolytic Alkali Company (Limited)*, reported in *The Times Law Reports*, Vol. 30, No. 16, p. 313, February 27, 1914, the decision being given in the House of Lords on February 12, 1914. The suit was for the enforcement of a contract by which the plaintiff company agreed to buy and the defendant company agreed to sell a certain number of tons of salt during a period of four years, the defendant company not to manufacture salt beyond such amount, with an unimportant exception, the defendant company, however, being given the privi-

lege to repurchase a certain amount of the salt sold by it to the plaintiff company. The question was, whether the contract was in unreasonable restraint of trade, and so contrary to public policy. The plaintiff succeeded at the trial, but the appeal of the defendant was allowed in the Court of Appeal by vote of the Lords Justices Vaughan Williams and Farwell, Lord Justice Kennedy dissenting, opinions being given by all three Justices.

In the House of Lords the Lord Chancellor is reported as saying as follows:

"Unquestionably the combination in question was one, the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices might in point of fact be disadvantageous to the public. Such a state of things might, if it was not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade was an evil from a public point of view. The same thing was true of a supposed monopoly. In the present case there was no attempt to establish a real monopoly, for there might have been great competition from abroad or from other parts of these islands than the part which was the field of the agreement".

And he referred to the *Adelaide S. S. Co.* case, *supra*, in which also the opinion was written by him.

In the Court of Appeal Lord Kennedy said as follows:

"To the consumer, no doubt, anything which maintains the price of an article is *prima facie* disadvantageous, and any restrictions on output or sale, any bargain between sellers not to lower prices, is, in regard to the consumer, *pro tanto* against his interest. But it seems to me that we have to remember that the working of the salt

trade, like the working of any great branch of production, is an exceedingly intricate matter, and, in considering the question of public policy, we surely must bear in mind not only plentiful production and cheap prices, but also the importance to the community of the maintenance of the trade, and the possibility of such a trade becoming either extinct, or becoming the subject of a monopoly in a few hands, or possibly one hand only, if all mercantile bargains of sale which contain restraints upon unlimited production or unlimited sale are held unlawful, and the trade is exposed to a ruinous competition through the consequent cutting of prices. In the present case, as it appears to me, there really was no evidence upon which, so far as the interest of the community has to be considered, it can rightly be held to have been proved that this contract was contrary to public policy. * * * I do not find, with all due respect, of course, to the different view of the other members of this court, that there is any sufficient evidence either in the terms of the contract or in evidence outside the contract that the restrictive clauses of the contract were in fact so necessarily injurious in their operations that it ought to be invalidated on the ground of public policy."

It is submitted that before any contract or combination can be held illegal under Section 1 of the act, it must be alleged and proved that thereby trade or commerce was in fact restrained. If it be found that thereby trade or commerce was promoted, or that what was done was not prejudicial to the public interests, it cannot be held illegal. If it is uncertain whether trade or commerce was thereby restrained or promoted, or whether the contract or combination "prejudiced the public interests" or was "to the detriment of the public," the burden of such uncertainty must turn the scale against him who asserts its illegality.

In the *Joint Traffic Association* case the agree-

ment, which limited competition between railroads, was found to be illegal because it tended to raise rates for transportation of commodities and so to increase the cost of commodities, and thereby, presumably, reduce the number of purchasers. The proposition which the plaintiffs in this case must establish from the allegations and the proofs is, that there was a combination among the defendants which decreased transportation facilities and so diminished trade in commodities, between New York to South Africa. The mere matter of rate, whether higher or lower, is not very important. Trade or commerce may be increased by better facilities, such as more regular sailings, more and better ships, &c., even at higher rates.

There is nothing in law to compel any ship to run from New York to South Africa. Ships are free to go where they will, to carry freight between any points which can be reached by water over the world. Unlike railroads, neither law, nor any other necessity, fixes them upon particular courses. This makes a radical difference. Railroads are necessarily fixed in place, and they are not free to do business or not, as they will. Who can say that otherwise than under the plan adopted, any of the ships of the defendants would have supplied facilities for transportation of commodities between New York and South Africa during the time referred to in the complaint? If there was a reasonable necessity for working under some such plan in order to enable the shipowners to do a profitable business on this route, then it follows, that, if this necessity had not been met, their ships would not have run on this line, and their contribution to trade and commerce with South Africa would have been withheld.

Obviously the one thing above all others to promote and increase trade and commerce between New York and South Africa is regularity of ser-

vice, with steadiness of rates. If merchants can count upon a regular service and reasonably steady rates, they can make contracts with the assurance of being able to carry them out, and can figure prices safely.

If to the merchant regularity of sailings is all important, and steadiness of rates is desirable, there is at least as much necessity for the shipowner to be assured of a regularity of demand for his services. Indeed, the necessity is greater. The expenses of a ship continue whether she is full or empty, either waiting for cargo, sailing the sea, or waiting to discharge. In regard to South African trade, the margin of hazard to the shipowner on this head is the greater in that the time necessary for discharging is particularly uncertain, and, further, there is no cargo to carry away from South Africa. The one thing that will promote such trade is that both of these necessities should be satisfied. The whole purpose of the plan under which the defendants acted was to achieve this result; that is, to secure such a regular supply of cargo as should justify the provision by the defendants for regular service and reasonably steady rates. The effort of all the original defendants has been to build up the trade in commodities between New York and South Africa.

That trade in general has been hampered and restricted must be proved by the plaintiffs. They do not prove this by pointing to the fact that certain shipments might have been made by them at lower rates. It is a question not of one man's trade, and one man's interests, but of the volume of trade, and the public interests.

The record in this case shows a remarkable development of an entirely new trade to South Africa. It shows what combined capital and combined experience and talent can do in the promotion of trade and commerce. And this makes pertinent the language of Lord Coleridge in the *Mogul Steam-*

ship Company case (21 Q. B. D., 544, 548, as follows:

"I have not forgotten that there is from the defendants' point of view some moral and sensible defence for their conduct, whatever legal view may at last be taken of it. They run, or at the time of the conference they did run, steamers regularly all the year round from England to China and back again, conferring as they say, thereby a considerable benefit on the mercantile community of both countries. Further they allege, and I think upon the evidence before me truly allege, that they could not do this at a profit, and that they would therefore probably cease to do it at all, unless they can practically monopolize the carrying trade of the tea at Shanghai and Hankow during the China tea harvest. It is the large profit they make by keeping up the rate of tea freights, so to call them, which enables them to give a regular line of communication during the other months of the year. They contend, therefore, that what they did by the rules of the conference was not purely selfish, though of course self-interest guided them, but that there were real and large public benefits accruing to the inhabitants of China and England from the course which they pursued. I think there is ground for this contention, and it should be kept in mind."

That to do business on the rebate or commission plan, as alleged here, is not to monopolize or attempt to monopolize, was held in the Whiskey Trust cases.

In re Corning, 51 Fed. R., 205;

In re Terrell, 51 Fed. R., 213;

In re Greene, 52 Fed. R., 104.

The same thing was decided by three of the four Judges who had before decided the Northern Se-

curities case at circuit, in the Continental Tobacco Co. case.

Whitwell v. Continental Tobacco Co.,
125 Fed. R., 454.

As we understand this Court to have decided as to both section 1 and section 2 of the act, only such combinations are condemned as prejudice the interests of the public, or as are, to use the language of the Australian Act, to the detriment of the public. If the plan which was followed promoted trade with South Africa, increased the volume as well as the regularity of such trade, it conduced to the interest of the public and cannot be condemned under either section of this law.

Up to this point we have taken the facts substantially as alleged, or rather as the plaintiffs' counsel claims them to be in argument. But the proofs fell very far short of this. Neither as alleged nor as proved do the facts show any combination illegal under either section of the Sherman Act to which the defendants were parties.

a. The principals are not shown to have combined as alleged.

All that the plaintiffs have shown is the testimony of two agents in New York of some of the defendants that, at certain times, certain lines or steamship owners were in conference in London (*Norton*, pp. 59, 47; *Barber*, pp. 19, 69). The agents were not parties to any conferences, and there is no direct evidence of the nature or extent of the conferences, who composed it, nor what the agreement, if any, was that the parties to the conference made. Mr. Norton states that the principals "conferred together to the end of maintaining the service and agreeing on rates of freight; fixing rates of freight to work the business. As far

as I know, they also conferred together relative to dealing with tramp steamers when they entered into competition" (p. 59).

Mr. Barber's testimony does not add anything to Mr. Norton's assumption of what took place. Neither Mr. Norton's firm, nor Mr. Barber's had any interest in the business, except as agents, obtaining a commission on freight actually booked (*Barber*, pp. 73, 81; *Norton*, p. 62)).

The agents gave the only tangible evidence as to the parties who, individually, or otherwise, composed the alleged conference. There is no testimony of any terms of any agreement or conspiracy formed by any parties to the conference, unless the circulars can be regarded as supplying such information. They do not do it expressly; they do not contain more than a statement that the signatories to the circulars will pay return commissions on vessels dispatched by them. They do not show any agreement other than that among the signatories themselves. Whether or not the existence and issuance of the circulars under the direction of the London principals of the agents in New York was sufficient to permit the jury to draw inferences in support of the plaintiff's allegations of combination and conspiracy, it would seem obvious that they were not sufficient to warrant a charge to the jury as a matter of law, that a combination and conspiracy, as claimed in the complaint, had been proved.

Indeed, the evidence went further and showed conclusively that the combination charged in the complaint did not exist.

The complaint alleged in the eleventh article (p. 7) "that at some time prior to December, in the year 1898 * * * the defendants, Union Castle Mail Steamship Company, Limited, the firm of Cayser, Irvine & Company, the firm of Barber & Company, the Bucknall Steamship Lines, Lim-

ited, the firm of Donald Currie & Company, and the firm of Norton & Son, entered into a contract or agreement, and engaged in and formed an illegal combination and conspiracy among themselves, in restraint of trade and commerce among the several states of the United States and with foreign nations, in violation of the statutes," and formed a scheme or ~~traffic~~ agreement to prevent the plaintiffs and ~~other~~ shippers from employing such other agencies and facilities as might be offered, and in furtherance of the scheme and conspiracy, announced "that they, the said defendants, would thereafter be united and be known under the name or style of The South African Steam Lines," and, thereupon, issued and distributed the circular, Exhibit A.

The fourteenth clause of the complaint (pp. 9, 10) alleged, "that about the middle of the year 1901, the defendant, Deutsche Dampschiffahrts Gesellschaft, Hansa, and the firm of Funch, Edye & Company, as its agents," were requested and permitted "to become part of the scheme and combination aforesaid, and for such purpose all of the defendants herein agreed to maintain and continue together the monopoly of the transportation trade to South African ports, so established as aforesaid," and, thereupon, they issued the circular Exhibit B.

As amended, the seventeenth paragraph alleged "that by reason of the monopoly so created and maintained by the defendants herein, except the Hansa Line, and Funch, Edye & Co., prior to November, 1901, and by said defendants together with the Hansa Line and Funch, Edye & Co., ever since November, 1901," the plaintiffs had been restrained from trading freely, and had been compelled to submit to "the monopoly created and maintained by the said defendants as aforesaid, and by reason of their compulsory submission to the monopoly so unreasonably, unwarrantably and

unlawfully created and maintained by the said defendants, as aforesaid, higher, unreasonable and unlawful rates had been exacted by the defendants."

The eleventh paragraph of the complaint thus charged an agreement or conspiracy by certain specified defendants "prior to December in the year 1898."

In the fourteenth paragraph (pp. 9, 10) it was alleged that the Hansa Line and Funch, Edye & Company, as agents became "part of the scheme and combination aforesaid."

In the seventeenth paragraph (p. 10) it was alleged that "by reason of the monopoly so created and maintained by the defendants herein, except the Hansa Line, and Funch, Edye & Company, prior to November, 1901, and by said defendants together with the Hansa Line and Funch, Edye & Company ever since November, 1901," the plaintiffs had been injured.

The combination thus charged either was an agreement between the named parties beginning in 1898, and continuing after 1901, with the addition of Hansa and Funch, Edye & Company, or it did not exist at all so far as the plaintiffs' case was concerned. The wrong charged against the defendants was a joint wrong. As the Court said in *Jayne v. Loder*, 149 Fed. Rep., 21, "a joint tort being charged, not only had it to be proved as laid, but the defendants had all to be liable for all that was resolved upon or done."

The undisputed proofs showed that the various parties enumerated in the eleventh paragraph of the complaint did not form a combination or conspiracy as alleged, and could not have done so.

The Union Castle Mail Steamship Company and the Bucknall Steamship Lines, Limited, were dismissed from the case because it appeared that they

were corporations that were organized in 1900 (p. 127). This was more than two years after the date of the alleged combination or conspiracy.

The complaint was also dismissed as against the firm of Donald, Currie & Company (fol. 799) because two of the members of the firm had died before the trial and the proofs did not show who the members of the firm were.

The only other principal left in the case to be considered is the firm of Cayser, Irvine & Company.

Mr. Barber says (p. 69) :

"During the period in question, that is, from January 1, 1899 to June, 1903, the members of the firm of Cayser, Irvine & Company were the persons named in the complaint to the best of my knowledge and belief."

If that statement is to be regarded as proof of the members of the partnership, at least it does not cover more than the period specifically mentioned of January 1, 1899 to June, 1903.

Mr. Barber also stated that "Cayser, Irvine & Company were a part of what is designated as the Union Clan Line" (p. 69). That was true, however, of only part of the period, for when asked if Cayser, Irvine & Co. had not worked with the Union Castle Mail Steamship Company as the Union Clan Line, he answered: "They were in 1901 but not from the first date you mentioned, 1899. Prior to that they had another organization" (p. 68).

It would seem obvious that the same reasons which were sufficient to eliminate the Bucknall Steamship Lines and the Union Castle Mail Steamship Company from the case, because they were not in existence at the time the combination was alleged to have been formed, should equally apply to Cayser, Irvine & Co.

The testimony of Mr. Barber and Mr. Norton was brought out from them as witnesses for the plaintiffs. It is the only evidence on the subject and by that evidence the plaintiffs' case must stand or fall so far as the essential elements are concerned of the parties to the alleged combination.

Thus there was a complete failure of proof of any combination by principals as alleged in the complaint.

b. The agents did not take part in any combination or conspiracy as alleged.

The undisputed proofs also show that the defendants who are charged, as agents, were not taking part in the conference prior to January, 1899, the calendar year subsequent to that in which it is claimed the combination or conspiracy was formed.

At page 46 Mr. Norton said that the firm of Norton & Son, as composed of himself and his son, "so existed between January, 1899, and June, 1903." He was asked:

"Q. During that period you were agents of the Bucknall Steamship Lines, Limited, and Messrs. Donald, Currie & Company, were you not? A. From what period?

"Q. During the period from January, 1899, to June, 1903? A. January, 1899."

Again at page 47, he was asked:

"Q. Did you have in your possession at any time during the period I have referred to, namely, from January, 1899 to June, 1903, any copy of any purported agreement between them? A. I do not recollect it, sir. If we did, I have not been able to find it."

At page 48, plaintiffs' counsel asked, "as a matter of history relative to this subject," whether or not certain Steamship Lines had not carried freight at uniform rates without compet-

ing with one another from 1893 to 1903, and if Mr. Norton had not issued circulars to shippers on behalf of the lines he represented.

Mr. Norton stated that his recollection was to that effect (p. 48).

The testimony of Mr. Barber was to the same effect, as he said (p. 68) :

“From January, 1899, our firm was the New York agent of the Union Clan Line. The Union Clan Line was a trade name.”

There is the further difficulty with respect to Barber & Company that they were incorporated in 1902 (pp. 68, 72), and the incorporation is not a party to the suit.

The acts performed by the agents themselves, pursuant to instructions received from their principals, are not of such a nature as to involve them as parties to any agreement under which their principals may have been acting.

The agents acted wholly in a subordinate capacity, carrying out the instructions they received. The agents were not party to any agreement, they did not have any interest in the vessels, nor in their earnings (p. 62). They obtained a commission merely on the freight that they booked (pp. 73, 81, 83, 134, 141, 142).

The fact that during a portion of the time from 1899 to 1903 they divided equally between them their commissions, as agents, on the freights, was not a matter that was in any way a part of the alleged conference or agreement in London.

As Judge Hough stated on the first trial, they were “merely mouth-pieces of their principals, and themselves made no combination whatever except in respect of their own commissions—something obviously not within the purview of the Act” (149 Fed. Rep., 935).

Indeed, the position of the defendant agents

would seem to be not otherwise than that of the ticket agents or freight agents of any railroad. If such railroad employer should enter into an agreement which the law should condemn, and the agents booked freight on the terms of such agreement and obtained their commissions on the amount of freight as booked, it could not be contended that each agent was in any sense *particeps criminis*.

Assuming, but not conceding, that a combination of the principals was shown which was in violation of the Anti-Trust Act, the defendant agents here can no more be regarded as parties to it, than the hundreds of freight agents of the railroads involved in the *Trans-Missouri Freight Case*, and in the *Joint Traffic Association Case*.

The decision of the Circuit Court of Appeals in the Third Circuit, in *Jayne v. Loder*, 1906, 147 Fed. Rep., 21, 31, is a direct authority to the effect that the plaintiffs, having alleged a joint tort committed by all the named defendants, have to prove their charge as made. In fact, the proofs show that they have failed to connect any of the defendants with the alleged combination or conspiracy said to have been formed "at some time prior to December in the year 1898" (p. 7).

c. The acts complained of as constituting a combination or conspiracy took place in London outside the jurisdiction of the United States and, therefore, could not be made illegal by the Sherman Act.

The foundation of the plaintiffs' claim, as alleged, is a combination or conspiracy illegal under the Sherman Act. Their recovery could only be for injury by reason of such combination or conspiracy.

It is beyond dispute that whatever was done in bringing the several shipowners into a plan of harmonious action was done in London. What was done in London could not be made illegal by any

statute of the United States. For this proposition we need only refer to *American Banana Company v. United Fruit Co.*, 213 U. S., 347. If what had been done there had been done by way of formation of a partnership or a corporation which should own and operate all the ships belonging to any and all of the original shipowners defendants, there would seem to be no room for doubt that such combination would not be affected as to legality by the Sherman Act. If, so uniting their properties and business, these shipowners had done business here in substantially the mode in which they are alleged to have done it, there could be no charge of an illegal combination or conspiracy under our law. What such combination did here would of course be subject to our laws, but the combination could not be made illegal by our laws.

All that was done on this side of the water was done by the agents, as such, under instructions from London, and what was so done we submit was legal or illegal in precisely the same way as if the union of interests and action on the other side of the water had been complete as it would have been by the formation of a partnership or corporation taking over the property and business of the several foreign shipowners. That the shipowners, acting, as it is alleged, in harmony as the result of conferences, sent their instructions severally to their several agents in New York, we submit makes no difference. And the union of interests in London, which was the only combination, could not be affected one way or the other by the fact that it stopped short of a complete union of property and business, and acted through several agents of the several parties to the union rather than through one agent of a supposed partnership or corporation in which all the interests of the shipowners were vested.

Illegality cannot be charged against any acts

done here merely by reason of any combination of interests in other countries.

There was no combination here. There was none anywhere to which the agents here became parties. The agents knew that they received like instructions, and, of course, inferred that their principals were somehow acting in harmony, but with the arrangements from which such harmony of action resulted they were in no way connected.

This case does not present the inquiry whether acts done here pursuant to a combination formed elsewhere might be enjoined or be made the basis of criminal proceedings. The only combination charged in the complaint is one that is alleged to have been illegal as formed. No such combination was proved. But if the combination, to establish which the plaintiffs' proofs were directed, could be regarded as proved, yet, because of its foreign *situs*, it would not be one that could be made illegal by the Act; and so an action under Section 7 could not be maintained for injury claimed to have been sustained by reason of such combination.

That what was done in England was lawful according to the English law is quite evident from the *Mogul Steamship Company* case, and it could not be made unlawful by any law of this country. Nor was there anything unlawful in the instructions which the parties to the combination in London, if it be assumed that there was one, sent to their respective agents in New York. The combination is the only thing which it is claimed makes a basis for the plaintiffs' case, and the combination being lawful, even if for no other reason than that it was made beyond the jurisdiction of the United States, the claim of the plaintiffs of injury "by reason of anything forbidden or declared to be unlawful by this Act" must fail.

(d) What the original defendants did, as shown by the proofs, actually developed the trade and commerce of the United States with South Africa—promoted or was favorable to such trade and commerce.

The defendant Edward N. Norton has been identified with the South African trade since 1867 or 1868, either as broker, agent or charterer, loading ships from this port to South Africa. The trade is one of export only, there being no return cargoes (p. 61). Mr. Norton berthed the first vessel that went to South Africa from this country, about 1872. He maintained a service of chartered sailing vessels from that time until 1893. In the beginning, there were only a half a dozen shippers who provided cargoes for little sailing vessels of four or five hundred tons. During the first year that the trade was started, three or four small vessels sailed from this country to South Africa.

In 1893, the trade had developed by means of the facilities offered for it until fifty or sixty sailing vessels were dispatched each year (*Norton*, p. 62).

In 1893, Mr. Norton saw that the business would warrant a steamship service, and he thereupon communicated with the various steamship owners, and, as a result, earlier organizations of certain of the defendant carriers undertook to supply steamers for the business (*Norton*, p. 62).

From that time forward, Norton & Son had never had any interest in the business except as an agent (pp. 62, 63).

The business was begun with steamers on a conference basis, Norton & Son representing the Bucknalls, and Barber & Company representing some of the other owners (p. 69).

With the advent of steamship business, traffic

developed very rapidly. In 1893, eight steamers were dispatched. By 1898, trade had grown to such an extent as to require the service of forty steamers, and in 1903 seventy-seven steamers were dispatched (*Norton*, p. 63). These were vessels of from five to ten thousand tons burden (p. 80).

In addition to furnishing steamer tonnage according to the growing requirements of the trade (p. 62), the Conference steadied the trade by providing comparatively regular dispatches of steamers as the needs of the trade demanded (p. 63). At times, there was depression in the trade, and at other times there were booms (p. 63). The development of the trade, of course, depended on the state of the market in Africa (p. 63). Carrying on their service as required by the conditions which attended it, vessels were dispatched from 1899 to and including 1904 with comparative regularity, sailings being distributed so as to fall usually from two to four, and sometimes five, per month (pp. 177-180).

The causes of the development of trade during these years are somewhat uncertain, but it at least may be said that the improvement of transportation facilities naturally tends toward the development of foreign trade, and this improvement was brought about chiefly by the original defendants and their predecessors, working along the same lines. The evidence certainly does not tend in any way to show that what these defendants and their predecessors did restrained trade or commerce in commodities between New York and South Africa; and that is what they were required to show to maintain the action. The burden was on them.

THIRD POINT.

The judgment appealed from should be affirmed, though it be assumed that the facts, within the pleadings, showed a combination or conspiracy illegal under the Anti-Trust Act, because they did not show injury to the plaintiffs by reason thereof.

This is a statutory action and every element required by the statute must be alleged and proved. The injury is as much a part of the cause of action as the something forbidden.

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act"—only such a person is entitled to sue under § 7 of the act, and what he is entitled to recover is "three fold the damages sustained by him."

In *Parsons vs. Chicago & N. W. Ry. Co.*, 167 U. S., 447, it was held that, in a somewhat similar action under the Interstate Commerce Act, plaintiff must show not merely the wrong of the carrier, but that the wrong had in fact operated to his injury.

That case came up on demurrer, and the form of the statute is shown in the following quotation. In the opinion Mr. Justice Brewer said:

"The only right of recovery given by the Interstate Commerce Act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act.' So before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury. * * * We think, therefore, * * *

the plaintiff has failed in that *full and clear showing of injury* which is necessary to justify a recovery under the Interstate Commerce Act."

This case was followed in *Pennsylvania R. R. Co. v. International Coal Mining Co.*, 230 U. S., 184, 201, which comes under the same section of the Interstate Commerce Act, and in the opinion it was said:

"The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved, they could not be recovered."

And it was further said:

"This conclusion that the right to recover is limited to the pecuniary loss suffered and proved, is demanded by the language of the statute, the construction put upon it years ago in the *Parsons Case*, and in the view taken in the only other case we find in which this question, under the act to regulate commerce, has been construed."

Reference was made to *Knudsen-Ferguson Fruit Co.*, 148 Fed. R., 974, and it was further said that a similar principle was applied in *Meeker v. Lehigh R. Co.*, 183 Fed. R., 550, and in *Central Coal & Coke Co. v. Hartman*, 111 Fed. R., 96, "where the suit was to recover damages caused by a violation of the anti-trust act."

The similarity of the language of the two acts was thus recognized. There is no substantial difference.

Reference was also made to the case of *Hoover v. Penna. R. R. Co.*, 156 Pa., 220, which arose under a state statute which, like the commerce act, gave

the injured party a right of action for damages, and the following is quoted therefrom:

"The 'amount of injury suffered' is the measure of the single damages to be allowed. But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be or it might not be; but, in any event, it must be a subject of proof."

In his charge to the jury in *Lowry vs. Tile, Mantel & Grate Association*, which arose under the Sherman Act, 106 Fed., 38, Judge MORROW said:

"It is not enough, in an action of this kind which is one at law, for the plaintiffs to establish the existence of an association which comes within the prohibition of the act of Congress. Plaintiffs must go still further, and the burden of proof is upon them to show some real and actual damage to their business by reason of such an association."

It must therefore appear from the facts alleged and proved that the plaintiffs were injured by the defendants by reason of an illegal combination. Under this point, for the sake of argument, it is assumed that the facts alleged and proved show an illegal combination. But do they show (1) actual injury to the plaintiffs, (2) by the defendants, (3) by reason of such combination?

What is intended as alleging the injury is in paragraph Twenty-sixth (quoted in full on page 13, *ante*). Its meaning is not clear; but there seem to be two items of injury—(1) the £1,112 7s. 11d. and (2) the further sum of \$10,000 "for loss sustained by reason of the restraint of their business and trade as aforesaid." Whatever may be said as to the first item, no facts are alleged, nor were any facts proved, showing the second item of

injury; and we insist that for this reason, without more, this second item must be disregarded.

But the pleader does not even allege in the words of the statute. He speaks of the \$10,000 loss only as "sustained by reason of the restraint of their business and trade as aforesaid," and there are no allegations of fact showing any restraint of their business and trade. Nor does the statute concern itself with the restraint of business or trade of one man or set of men. It forbids only combinations in restraint of trade or commerce, interstate or foreign, generally. To allege an injury resulting from a combination which restrains plaintiffs' trade or commerce is not to allege an injury "by reason of anything forbidden or declared illegal by this Act."

Furthermore, this second item of injury appears to be alleged only as incidental to the first item—expenses incurred in attempts to get back the £1,112, &c., &c. Hence, the second item adds nothing in determining whether any injury within the statute was shown.

No facts are shown either by the allegations or by the proofs—merely the bald statement of so much injury; the injury is not alleged to have been done "by the defendants"; and, moreover, any injury which we may imagine the pleader to have had in mind must be purely speculative, not susceptible of proof, and which could not, therefore, be the basis of any recovery.

Comparison cannot be made between conditions as they were and conditions as they would have been if the combination had not existed. What the conditions would have been, if the combination had not existed, is a matter of speculation. If speculation could be resorted to, the obvious reasonableness of the plan makes it probable that the ships of the defendants would not have been engaged in

this commerce, if this plan, or something like it, had not been adopted.

Judge Hough (149 Fed. Rep., 933), said:

"What South African business the plaintiffs had was created in conjunction with the defendants' combination. This combination injured neither the business nor the property of the plaintiffs, except by possibly depriving them of greater profits than they might have made had the defendants chosen to enter upon African business under other conditions. They were not obliged to enter upon African business at all."

"Actual damage must be calculated, not imagined, and an arithmetical calculation cannot be made without *certain* data on which to make it."

N. Y. vs. Ransom, 23 How., 487.

The Conqueror, 166 U. S., 127.

Rude vs. Westcott, 130 U. S., 152.

Imaginary profits under other conditions, cannot be made the basis of claim of injury or damages.

For various reasons, the language found in the opinion in the *Central Coal & Coke Co. vs. Hartman*, 111 Fed. Rep. (C. C. A.), 96, is applicable, as follows:

"Now, the anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative and uncertain to warrant a judgment for their loss."

See cases cited.

There remains only the first item of injury, that "by reason of the premises these complainants have been damaged in the sum of £1,112

7s. 11d., equal to \$5,560, for money paid in excess of the rates by defendants deemed to be reasonable, fair and profitable." This cannot refer to anything else than that portion of the money voluntarily paid on shipments of freight which, according to contract, they were to receive back upon certain conditions, but which they had not received back because the conditions were not fulfilled. The allegations are somewhat vague, but this is the meaning most favorable to the plaintiffs. It is not clearly stated, but it appears by the proof, that the conditions were not complied with.

It seems to be claimed that the plaintiffs were injured because they accepted the offers made in accordance with the circular letters, entered into contracts with the several defendant shipowners accordingly, voluntarily paid the freight charged, and then could not get part of the money back they had voluntarily paid in pursuance of such contracts. If this was an injury, it was not caused by the combination; the cause was the plaintiff's voluntary action. *Volenti non fit injuria*.

It does not seem to be pretended that plaintiffs were in any way prevented from shipping on other lines at any time, except by their reluctance to put an end to their rights to receive the rebates upon compliance with the conditions upon which their right was dependent. If an "injury" in this respect can be thought of, such injury was by reason of their reluctance to break the conditions agreed upon; it was not by reason of the combination.

It does not appear from the proofs that plaintiffs ever tendered any merchandise to any of the defendants asking that it be carried on any other terms than those of the circular. If they had, this would have meant nothing in law because defendants were in no way bound to comply with any such demand.

In *Whitwell vs. Continental Tobacco Co.*, 125 Fed. R., 545, it was said :

"There is another reason why the complaint in this action fails to state facts sufficient to constitute a cause of action. The sole cause of the damages claimed in it is shown to be the refusal of the defendants to sell their goods to the plaintiff at prices which would enable him to resell them with a profit. Now, no act of omission of a party is actionable, no act or omission of a person causes legal injury to another, unless it is either a breach of contract with, or of a duty to him."

Plaintiffs had no right to demand that the original defendants carry for them on any other terms than those under which they offered to carry freight to South Africa generally. Not being bound to engage in such transportation at all, they could impose such terms and conditions for the acceptance of freight generally as they saw fit. A railroad company has somewhat different obligations, because of the franchises given to it and the corresponding special duties imposed upon it. The ships of the original defendants were offered for the South African trade under the terms of the circulars put in evidence. Undoubtedly such defendants severally assumed the obligations of common carriers with respect to freight accepted, and perhaps were bound to receive without discrimination freight offered according to their proposals. But no public duty required them to accept freight on other terms or conditions.

The plaintiffs offered no evidence that the rates charged were unreasonable. They showed nothing more than that the 10 per cent. commission which they would have received, if they had complied with the terms of the circulars under which they made their shipments, had not, in certain instances, been returned to them. This meant no

more than that, in certain cases, other shippers who did comply with the terms of the circulars had their goods carried for 10 per cent. less. But, as Wallace, J., said, in the case of *Menacho v. Ward*, 27 Fed. Rep., 529:

"It is his (the carrier's) privilege to charge less than a fair compensation to one person, or a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them."

The only direct evidence adduced on this subject was that of the plaintiffs' witness, Barber. He was a man of large experience, not only as an agent, but as a shipowner. He stated in the most unqualified manner that the rates charged throughout the period mentioned in the complaint, treating the primages as an integral part of the rates, were just and reasonable (pp. 76, 77, 141).

The matter does not, however, rest there. The evidence shows that throughout the period mentioned the plaintiffs, in a legal sense, treated and accepted the rates as reasonable. Mr. Sulima indeed, suggests that at times, in conversation with the freight brokers on the exchange he had taken the ground that the rates were high (p. 115). The proofs do not show, however, that he did anything more than that. He made his freight engagements, in every instance, at the rates which the agents asked, which included primage, and never protested, either at the time of completing his shipping arrangements, or at the time of receiving the bills of lading in which the freight rates were set forth, or at the time when he paid his notes for the freight and primage on the individual shipments. In a legal sense, the primary contracts or engagements for the various shipments, the making of the shipments by the delivery of the goods to the vessels, the acceptance of the bills of lading, with freights and primages

at tariff rates stated on the face of them, and the prepayments which the plaintiffs made of the freights, were all entirely voluntary, and not subject to any protest.

A further and significant circumstance evincing an unqualified acquiescence in the reasonableness of the rates, should be emphasized. The freights on the plaintiffs shipments were in every instance prepaid at New York. The plaintiffs evidently desired to negotiate their bills of lading at a bank before paying the freights. Accordingly, when their bills of lading were signed and were ready for delivery, they went to the offices of the agents, and obtained possession of the bills of lading against their promissory notes, referred to in the testimony as due bills, for the amounts of freight and primage shown on the bills of lading. In substance, they asked an indulgence of the agents, and that their personal liability should be accepted in place of the lien which the agents had on the goods, and on the bills of lading, until the freights specified in them to be prepaid, should be actually prepaid—all without the slightest word of protest or objection.

Subsequently, at their convenience, the plaintiffs took up their notes or due bills, as any other debtor would take up his note, by paying it in cash. At the times when such payments of the due bills were made, there was never a word of objection or protest.

A shipper, who means to contest his liability for a freight rate, which a common carrier asks for the transportation of goods, may protect himself against an unreasonable charge by objection to and protest against the rate the carrier demands; and by a specific tender of goods with a demand that they be carried for a reasonable rate. If he claims that the rate demanded by the carrier is unreasonable, he should tender what he believes to

be a reasonable rate. *Carr v. Railroad Co.*, 7 Exch., 707. If he makes no tender of goods with a demand that they be carried at a lower rate than that which the carrier demands, and pays the carrier's rate, without protest, he is conclusively presumed to have acquiesced in the reasonableness of the rate.

Killmer v. New York Central Railroad Co., 100 N. Y., 395;

Arnold v. Georgia R. R. Co., 50 Ga., 304.

"If one with a full knowledge of all material facts *voluntarily* pays that, which could not be lawfully demanded of him, he has thrown away his shield, and must abide the consequences; he cannot recover the money. He has waived the protection which the law offered him. His free and intelligent assent has made that right as between them, which would have else been wrong. *Volenti non fit injuria.*"

Kenneth v. R. R. Co., 15 Richardson (S. C.), 284.

The terms and conditions under which the defendants offered transportation to South Africa were well known to plaintiffs; they made no objection, the moneys paid were paid without objection, and after the goods were in transit.

It in no way appears that the plaintiffs were injured by the course of business followed by the defendants. As Judge Hough (149 Fed. R., 933) says: "What the plaintiffs are seeking to recover are the rebates due to those persons who gave their whole business to the defendants." Plaintiffs did not comply with the condition and so were not entitled to such rebates.

If the defendants had been willing to carry to South Africa at tariff rates, less the rebates,

without conditions, the plaintiffs might have done better for themselves or their consignees. But there is nothing to sustain the hypothesis. As Judge Hough says, 149 Fed., 933: "They [defendants] were not obliged to enter upon African business at all." And he said further: "What South African business the plaintiffs had was created in conjunction with the defendants' combination." If the latter had not put their ships on this trade, or had withdrawn them, the plaintiffs might have done no business with South Africa.

The plaintiffs do not claim that the business they did with South Africa, by the use of defendants' ships, netted them loss; evidently such business was profitable, although they deliberately forfeited a small part of the rebates conditionally promised them.

The evidence shows that the trade in which the plaintiffs engaged was practically inaugurated by the defendants' shipowners and their predecessors; that the facilities for such trade increased after the circulars, Exhibits A and B, were issued (p. 180). If speculation be indulged in, it is to be inferred that the plaintiffs made large profits by reason of the so-called combination, profits which there would have been no opportunity to make but for the facilities which the defendants furnished because of the stability secured by their system of business.

Nor does it appear that the addition of a 10% primage, and the failure to get it back to the extent of £1,112 was an injury to the plaintiffs rather than to their consignees in South Africa. Business done by the plaintiffs was of two kinds. One was commission business, in which the freight paid was of course charged to the consignees. In the other, called "c. i. f. business", the plaintiffs sold at a price agreed upon to include freight to South Africa and

insurance; but in making the price they took into account not only cost in New York but also the freight and cost of insurance (pp. 84, 85, 95, 96, 97). The price was of course a matter of trading. If the cost of buying the goods in New York and getting them to South Africa, plus a minimum amount of profit, exceeded the price which the consignees in South Africa would pay, there would be no trade. On the other hand, if the price in South Africa was so far in excess of the cost of delivering the goods there as to permit an excessive profit, trading would undoubtedly reduce the price to be agreed upon. The plaintiffs were not owners of large stocks of goods, but bought goods, especially grain, only to fill their contracts for delivery in South Africa, or in the commission business only for account of their customers. While it is quite true that a high rate of freight might prevent the making of such contracts, it certainly is not true that the addition of the 10% primage, if not returned in the way of rebates, showed corresponding injury to the plaintiffs in their business. Trade might be lost by high prices for goods in New York, as well as by high freight rates; and again there might be no margin for profit even if the freights charged had been without the additional 10% primage. Where trades were made, undoubtedly in the long run, whatever might be true of single instances, the consignees would at least share with the plaintiffs in the benefit of low freight rates and the burden of high freight rates; and in like manner as with respect to business lost because rates were high, it would be a pure matter of speculation, or perhaps rather of guesswork, to fix the amount of the loss of the plaintiffs as distinguished from that of the consignees. Such injuries and damages are not cognizable at law.

In *Penna. R. R. Co. v. International Coal Min. Co.*, 230 U. S., 184, 204, it was contended that where a rebate had been given to one shipper, another,

who had not been given a like rebate, could recover the amount of such like rebate upon his shipments, but this contention was overruled, and this Court said:

"There was no proof of injury,—no proof of decrease of business, loss of profits, expense incurred, or damage of any sort suffered—the plaintiff claiming that, as matter of law, the damages should be assessed to it on the basis of giving to it the same rate on all its tonnage that had been allowed on any contract-coal shipped on the same dates, whether such tonnage was great or small. * * *"

"The statute gives a right of action for *damages* to the *injured* party, and by the use of those legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. * * *"

"But the plaintiff may have sold at the usual profit all or part of its 40,000 tons at the regular market price, the purchaser, on his own account, paying freight to the point of delivery. In that event not the shipper, but the purchaser, who paid the freight, would have been the person injured, if any damage resulted from giving rebates. To say that seller and buyer, shipper and consignee, could both recover would mean that damages had been awarded to two where only one had suffered."

See Sixth Point, *post*, p. 72.

On page 75, *post*, we have pointed out that the verdict of the jury was apparently for the amount of the so-called rebates or commissions which were not paid because of breach of contracts under which they were payable. As was pointed out by Judge Hough at the first trial (149 Fed. Rep., 933, at pp. 935-6), the loss of such rebates is not an item

of damage that proximately grew out of any combination or conference of the defendants. It resulted from the breach by the plaintiffs of other and perfectly lawful contracts.

FOURTH POINT.

If the Circuit Court should not have directed a verdict for the defendants remaining in the case, it should not have charged the jury, as matter of law, that such defendants had entered into an illegal combination, but should have left this question to the jury.

See Charge, p. 158; Exceptions, pp. 162, 163; Assignment of Errors, pp. 195, 196.

The plaintiffs did not introduce any writing purporting to contain the terms of any combination or conspiracy. They did not examine any of the defendants except Mr. Edward N. Norton, of the firm of Norton & Son, and Mr. Herbert Barber, of the firm of Barber & Co. Both these gentlemen testified that they had never signed, nor seen, nor become parties to any agreement, combination, or conspiracy between themselves or with any of the other defendants. They testified that they were merely agents, employed to load ships for a fixed commission based on the freights engaged. Mr. Norton's firm had acted as agents, at different times between January, 1899, and June, 1903 (p. 46), for the firm of Bucknall Brothers, a firm not referred to in the complaint, and for the firm of Donald Currie & Co., the Union Castle Mail Steamship

Company and the Bucknall Steamship Lines, Limited, against whom the complaint was dismissed.

None of the principals charged with having formed a combination in 1898 was shown to have been in existence at that time.

It is doubtful from the evidence whether the organization of Cayser, Irvine & Co., which is sued as a principal in the complaint, was engaged in the South African service prior to 1901. Mr. Barber, referring specifically to the Union Castle Mail Steamship Company and to the firm of Cayser, Irvine & Co., for whom he had at different times acted as agent, says that they were operating together under the name of the Union Clan Line in 1901, "but not from the first date you mentioned, 1899. Prior to that they had another organization" (p. 68). Possibly another passage of his testimony may be open to the construction that a firm of Cayser, Irvine & Co. had been in the business from January 1, 1899 (p. 69), though that is not altogether clear. At all events, the later testimony is not inconsistent with his first statement that prior to 1901 Cayser, Irvine & Co. "had another organization" from that under which they did business after 1901, even though the same firm name may have been employed throughout.

Emphasis should, however, be laid upon the fact that while the complaint alleges the formation of a combination between all the defendants except the Hansa Line, and Funch, Edye & Co. "prior to December, in the year 1898," there is nothing in the evidence, either of Mr. Norton or of Mr. Barber, indicating that they acted as agents for any principal sued until *after* January 1, 1899.

It is manifest from their testimony that they could not have been parties to anything done "prior to December in the year 1898," by the other parties sued, and that they had no knowledge nor in-

formation of any kind with reference to any conference in existence prior to December, 1898, as alleged in the complaint.

The first circular introduced by the plaintiffs (*Plaintiffs' Exhibit A*, p. 169) signed "American & African Steamship Line" and "Union Clan Line," is dated London, December 31, 1898. It does not definitely appear who signed this circular with the trade names mentioned, nor does it appear that the circular was issued in New York otherwise than that it appears to have the stamp of Thomsen & Co. upon its face coupled with the date July 25, 1902 (p. 169). This circular is not on its face an agreement of any kind. The utmost that can be said of it is that it is a document from which an inference of some kind might be drawn. It would not, however, justify an inference that a combination of any sort existed prior to December, 1898.

It has already been urged that the plaintiffs' failure to produce evidence even inferential of the existence of a combination between the defendants prior to December, 1898, as charged in the complaint, was so complete that the Court should have directed a verdict for the defendants on that ground.

If, however, the defendants be wrong in that contention, they were justified in demanding that they have an opportunity to argue before the jury that the proofs did not warrant the inference that such a combination and conspiracy as charged in the complaint existed prior to December, in the year 1898, as is alleged.

The plaintiffs alleged that the defendants "formed an illegal combination and conspiracy" (fol. 39), by reason of which the plaintiffs were damaged.

A conspiracy involves a criminal intent.

"The gist of the offense of conspiracy is in the

illegal combination and intent," per Brown, J., in *U. S. v. Greene*, 100 Fed. R., 941, 945:

U. S. v. Frisbie, 28 Fed. Rep., 808, 809.

People v. Flack, 125 N. Y., 324, 332.

There was no direct evidence of any criminal intent on the part of the defendants. Whether or not they had committed acts from which a criminal intent must be inferred was for the jury to determine. As this Court said in *Lawlor v. Loewe*, 208 U. S., 283:

"There are some links which are proved not directly but as inferences from established facts. Different inferences were at least possible, and in a case of this sort where conspiracy to do an unlawful act is charged, it should be left to the jury to say which inference shall be drawn. Moreover, it was for the jury to determine from the entire body of proof what was the intent of the individuals, who made up the combination, or what they must have known were the necessary and inevitable consequences of their acts."

It has already been argued that the complaint as against the agents should have been dismissed because of the failure of any evidence to connect them with an agreement or combination of any kind or at any time. The undisputed evidence is that they acted merely as agents, having no interest of profit or loss in the business of operating ships and no voice in the policy or management of the business. The statement of the Court that rates were determined upon in New York was based on a misapprehension of the facts. The rates were always made in London, sometimes against the objection of the agents. No rates were charged except those which the principals in London directed should be charged. Manifestly they could not have joined

a combination alleged to have been formed "*prior* to December, in the year 1898," since they did not enter the business even as agents until after January 1, 1899.

The Court should have instructed the jury as to what facts or circumstances would justify an inference that they had or had not become parties to the combination alleged in the complaint at the time stated, and should have left it to the jury to find from all the evidence whether they in fact ever became parties to a combination as alleged.

It may be inferred from an inquiry by Juror No. 6 (p. 166), that, if the jury had found the agents had nothing to do with the disposition of the primage, they would have reached a conclusion that the agents were not parties to any combination. The proofs show that the agents had nothing to do with the disposition of the primage, merely paying as directed by their principals (pp. 58, 59, 64, 73, 74).

But, however that may be, if the Court was not bound to direct a verdict in favor of the agents on legal grounds, it should at least have permitted the jury to say whether the agents had entered into an unlawful agreement as charged in the complaint.

The rule on this subject is so familiar that citation of authority is scarcely necessary.

This Court has lately said in *Lawlor v. Loewe, supra*, a case involving an alleged conspiracy under the Anti-Trust Act, in consequence of which a judgment for damages had been recovered:

"The first assignment of error which challenges attention on this appeal and which is discussed at the outset of defendant's brief is the action of the trial Judge in taking the case from the jury and himself deciding every question, except the amount of damages. Defendants contend that in so doing the trial court assumed the function of the

jury in passing upon the credibility of witnesses and weighing the conflicting testimony. We think this assignment of error is well taken."

In *Gardner v. Michigan Central R. R. Co.*, 150 U. S., 359, 361, Chief Justice Fuller said:

"The question * * * is one of law for the Court only where the facts are such that all reasonable men must draw the same conclusions from them, or in other words a case should not be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

If there was any evidence that the plan under which the defendants operated was an unreasonable restraint of trade or prejudiced the interests of the public (which we dispute), the trial Judge had no right to withhold that question from the jury and instruct them to find a combination illegal under the Sherman Act.

After their motion for the direction of a verdict in their favor had been denied, the defendants duly excepted to the action of the Court in withholding this issue from the jury, and expressly requested that the evidence with reference to it be submitted to the jury for determination.

If the defendants' first request was wrong, their final one was right, and the error of the Court in denying it justified the reversal of the judgment.

FIFTH POINT.

The Circuit Court erred in declining to charge the jury that the burden was on the plaintiffs to show that the rates charged them on their shipments were excessive and unreasonable.

The Court had charged the jury, at pages 158, 159: "Notwithstanding the fact that I have stated to you as a matter of law that this was a combination forbidden by the Sherman Act, the question submitted to you is whether the rate was reasonable or unreasonable, and that is a question to be determined by you."

At the conclusion of the Court's charge the defendants requested the Court to charge the jury "that the burden of proof to show that the rate was excessive and unreasonable was upon the plaintiff, and that it was not the burden of the defendants to prove that the rates were not excessive."

The Court stated, "I will deny that."

Exception was duly taken by the defendants (p. 166).

The Court then reviewed certain evidence on the subject of rates and their reasonableness (pp. 158, 159) and told the jury that those were matters which they should take into consideration on the question as to whether the rate exacted by the defendants of the plaintiffs was reasonable or unreasonable (pp. 159, 160); but refused to instruct them that the plaintiffs were bound to show affirmatively that the rates charged were unreasonable before they could recover in this action (p. 166).

The very essence of the plaintiffs' complaint as set forth in the seventeenth and succeeding paragraphs was that in consequence of the action of

the defendants the plaintiffs had been compelled to pay "higher unreasonable and unlawful rates" (pp. 10, 11) than the defendants were entitled to charge.

It is a fundamental proposition that the burden is always on the plaintiff to establish affirmatively the essential elements of his claim.

In this case the main proposition put forward by the plaintiffs is that in consequence of the wrongful acts of the defendants the plaintiffs were charged and were obliged to pay unreasonable and excessive rates. The burden was on the plaintiffs to establish the proposition that they had asserted.

Testimony was given by both Mr. Norton and Mr. Barber, which was not disputed, of various circumstances concerning the nature of the trade that had to be considered by the carriers in fixing freight rates from New York to South Africa. A most important circumstance was the fact that there never has been any return cargo from South Africa for the United States. Vessels either had to proceed in ballast to the Far East and there try to obtain a cargo, or else they had to return to New York in ballast (*Norton*, p. 61). The distance from New York to South Africa is about 7,000 miles, and from there to India about 4,000 miles (*Barber*, pp. 73, 74). The latter distance at least would have to be travelled by vessels in ballast. According to Mr. Barber, perhaps one-third of the vessels that went from New York in the South African trade came back directly in ballast, while two-thirds of them went on to the Far East seeking cargoes, and did not come back to New York (p. 74).

Still another circumstance of the utmost importance was the delay to which vessels were subjected in discharging at South Africa. During the years 1899 to 1903, owing to the Boer War, South African ports were greatly congested with

steamers. The delays of vessels there were very great. The ordinary voyage of about thirty-five days (p. 74), was sometimes extended to one hundred and twenty days and more (p. 75). The facilities at the various ports were quite inadequate to handle the five passenger lines that ran there from Europe and the several lines of cargo vessels that went from Europe and from New York (*Taylor*, p. 151). Mr. Taylor, who was in South Africa from 1900 to 1903 (pp. 151, 152), says that the average time for the unloading of vessels was from fifty to sixty days (p. 152).

As the business to South Africa was partly conducted by chartered boats, the extent of the delay to which the ships would be subjected, and the consequent demurrage charges on the charterer prevented vessels from being chartered at normal rates (p. 75).

Mr. Barber, who was a ship owner himself and acquainted with the cost of operating steamships in such a service as that to South Africa (pp. 73, 74), stated that the rates charged during the period of which the plaintiffs complained were reasonable (pp. 71, 141).

Mr. Sulima, the representative of the plaintiffs, speaks at great length of rates that were offered by certain vessels from time to time that were lower than the rates that the plaintiffs actually paid, but in all his direct examination there was not a suggestion that he considered the rates that the plaintiffs were charged as being unreasonably high or excessive.

On his re-direct examination he made the statement that, in his opinion, a charge of more than twenty shillings a ton during the period of 1899 to 1903 would be more than compensatory. He was not a shipowner, charterer or agent, but a merchant or broker, and was not shown to be qualified to give an expert opinion on the subject (pp. 114,

115). Yet he does not anywhere suggest that the rates that the plaintiffs paid were unreasonably high.

Comparison was made by the plaintiffs between the rates that *they* were charged and the rates that were offered at certain periods on vessels running in opposition to the ships in which some of the defendants had an interest. It is stated by Mr. Barber that the rates by what were described as the "opposition vessels" were ridiculously low (pp. 80, 81). The Court, indeed, charged the jury that the rates charged on these opposition vessels "ought not to have any controlling weight, because it was shown by the defendants that it was a difficulty between rival steamship lines as to which should have the trade" (p. 159). But it was suggested to the jury that those were matters which they should take into consideration in determining whether the rates charged the plaintiffs were reasonable or unreasonable (p. 160).

While the defendants urge that on the evidence the Court should have charged that the proofs affirmatively established that the rates charged the plaintiffs were reasonable, yet on the most favorable view of the matter the plaintiffs could not ask more than that the entire evidence should be considered by the jury. If in weighing the proofs the jury might have considered that the facts tending to show reasonableness or unreasonableness were evenly balanced, they should have decided the question against the plaintiffs. For, if the evidence on the reasonableness of the rate were nicely balanced in the minds of the jury, their conclusion one way or the other would be determined by the fact that the burden of proof rested on the plaintiff, or the defendant, as the case might be. As Brett, *M. R.*, said in *Abrath v. N. E. Ry. Co.*, 1883, 11 Q. B. D., 440:

"Suppose that the jury, after considering the evidence, are left in real doubt as to

which way they are to answer the question put to them on behalf of the plaintiff; in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able, by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him."

From the fact that the Court declined to charge that the burden was on the plaintiffs to show that the rates complained of were unreasonable, the jury may well have assumed that the burden was upon the defendants to prove that the rates charged were reasonable.

SIXTH POINT.

The Court erred in permitting the jury to consider as elements of the plaintiffs' damages supposititious profits that the plaintiffs claimed they would have made if they had followed a different course.

See Point Third, *ante*, p. 49.

In the Twenty-sixth Article of the Complaint (p. 13) the plaintiffs made a general allegation that by reason of the premises they had been damaged "in the further sum of \$10,000 for loss and damage sustained by reason of the restraint of their business and trade as aforesaid."

This allegation was used as a cover by the plaintiffs to permit them to place before the jury certain claims for problematical profits on transactions that they never carried through.

An exception was allowed to the defendants on the entire line of the testimony on that point (p. 88).

a. The plaintiffs contended that in July, 1901, they received an offer from South Africa to purchase a quantity of wheat (p. 87). The price offered for the wheat was such at the freight rate asked by the vessels in which some of the defendants were interested, which are spoken of as the "Conference Lines," the plaintiffs claim they could not have closed a contract with profit (p. 88). Sulima claims that he could have made a profit of \$500 if he had shipped the goods by the Hansa Line at the lower rate of freight that they offered (p. 88).

A similar situation is claimed by Sulima to have arisen two weeks afterwards, on July 24, 1901 (p. 88). And a third instance is sketched out as arising on July 10, 1902 (p. 89), at a time when a lower freight rate was being offered by the competing vessels of the Prince Line (p. 87).

Documentary evidence to support these three isolated instances was not forthcoming. Sulima said that the orders came by cable, and the cables could not be found (pp. 87, 107).

Sulima claims that he "made several attempts to have the Conference Lines let us make these shipments at a rate that was profitable. They declined" (pp. 88, 89). He claims that in each instance the Conference Lines had in hand from \$3,000 to \$4,500 in return commissions that had accumulated during the fifteen months preceding (p. 91). The plaintiffs did not close these alleged contracts and make the shipments by the opposition lines, and they gave as their reason "that it was a choice between making the \$450 to \$500 on that shipment and, as we supposed, sacrificing the \$3,000 to \$4,000 of 10 per cent."

(fol. 484), "so that in each instance it was a choice between getting the benefit of the Hansa rate and the amount of rebates, or 10 per cent. which the allied lines held in their hands" (p. 94).

b. The plaintiffs also were permitted to offer evidence over the defendant's objections and exceptions (p. 93), that from June, 1901, until October, 1901, rates offered by the Hansa Line, that was then running steamers in opposition to the Conference Lines, were less than the rates that the plaintiffs paid on their shipments on the Conference steamers. The difference in the rates on the shipment made by the plaintiffs made during that period was stated to amount to \$8,485.85 (pp. 91, 93).

The plaintiffs' representative stated that the shipments were not made on the Hansa Line vessels. Sulima, the plaintiffs' representative, said that the rates on the Hansa Line never were accepted, the reason being "in each instance it was a choice between getting the benefit of the Hansa rate and the amount of commissions of 10 per cent., which the allied lines held in their hands" (p. 94).

Sulima testified about these possible transactions at pages 87-89, 100-102, 104, 105. He says that he was offered by cable, from ports in South Africa, a certain price for a given number of tons of grain. He then says that the rate offered by the Hansa Line would have permitted a profit of about \$500 (p. 88), but whether or not that was so was for the jury to determine with certainty from the facts. The defendants cannot be mulcted in damages for a loss of alleged profits to the plaintiffs, that rests only on the conclusion of the plaintiff's witness without the necessary facts to enable it to be verified. The plaintiffs do not state the rate at which they could have bought the grain nor the insur-

ance nor any other incidental expenses in connection with such a transaction.

The information with respect to the second alleged offer is still more scanty, and the profit claimed is much larger, amounting to \$1,350, or \$1,400 (p. 88).

As to the third alleged lot very little is in evidence. Sulima claims that the plaintiffs shipped 200 tons, a portion of the order, on two conference steamers (p. 89), but was unable to obtain room for the balance of the order, and could not obtain permission to ship it by the opposition, Prince Line vessel (p. 89).

We admit that the verdict of the jury does not seem to have been affected by this error, but to have been based solely upon the amount of the so-called return commissions, which, as shown by Plaintiff's Exhibit A-2 (pp. 182-187) was £1,005-9-11, the equivalent of \$4,911.84. The Judge stated that these commissions amounted to \$5,000 (pp. 160-161). The verdict was for \$5,600. and interest, perhaps accounted for by the fact that in the complaint the plaintiffs claimed the amount of these return commissions as £1,112-7-11, equivalent to \$5,560. The foreman (p. 167) said the jury could not fix the date (as to interest) "because they did not know when this was due and payable"; and further said: "Some of these were not payable until a certain time afterward, some six or nine months, and that left the jury very much in doubt when it was due." Defendant's counsel asked that it "be made plain from the verdict that this is the amount allowed in respect of the 10% commission"; to which the Judge replied that he would not require the jury to make any explanation. We are content to accept it as a fact that the jury were not influenced by the error referred to in this point, and that this point may therefore be disregarded, upon condition that it be equally accepted that the re-

covery provided for by the judgment in the Circuit Court was confined to and based only upon the so-called return commissions—that is to say, the moneys which the plaintiffs would have received if they had complied with the contracts which they made, but which they forfeited by non-compliance therewith.

In this connection it is proper to note the fact that on the first trial, two of the plaintiffs, Mr. Thomsen and Mr. Riedel, partners in the concern, testified to the damages they claimed, and spoke of the return commissions and extra labor, or expenses such as typewriting (p. 113). Mr. Thomsen had not said a word about these present claims (p. 114). The record shows that the Court stated,

“and I also understood that everything that the plaintiffs claimed by the way of damages consists of expenses or injuries of some kind growing out of the non-payment of these 1,112 pounds of rebates. Mr. Riedel, who was on the witness stand, acceded to this statement, and said it was true” (p. 113).

SEVENTH POINT.

The Circuit Court erred in permitting the plaintiffs during the trial to amend their complaint so as to set up a new cause of action.

The complaint as originally framed alleged that at some time prior to December, in the year 1898, the Union Castle Mail Steamship Company, Limited, the firm of Cayser, Irvine & Co., the firm of Barber & Co., the Bucknall Steamship Lines, Limited, the firm of Donald Currie & Co., and the

firm of Norton & Son, entered into a combination in restraint of trade and commerce with foreign nations in violation of the statutes of the United States (pp. 7, 8). It then alleged that in 1901 the defendants above mentioned and a German company, referred to in the testimony as the "Hansa Line," and its agents, Funch, Edye & Co., entered into an agreement or combination (pp. 9, 10), to monopolize the transportation trade to South African ports, in violation of the statute (p. 13).

There is no allegation in the complaint that the plaintiffs were injured by anything that was done prior to the formation of the combination of which the Hansa Line was a member.

The seventeenth paragraph of the complaint contains the first allegation of damage.

It alleged "that by reason of the monopoly so *created and maintained by all the defendants herein,*" the plaintiffs suffered damage by being compelled to pay unreasonable and unlawful rates of freight to the extent of £1112.7.6, which the complaint further stated "*has been forcibly so received, exacted and extorted from the complainants herein by the said defendants*" (p. 10).

The complaint plainly alleged that the injury complained of arose from the combination stated to have been formed in 1901, of which the Hansa Line was a part, and that this injury had been suffered by reason of exactions made by that alleged combination. It stated in effect that the amount so claimed to have been unlawfully exacted from the plaintiffs was received from them between November, 1901, and the date of the complaint, June 8, 1903.

At the first trial, for reasons not apparent on the face of this record, the plaintiffs, by leave of the Court, discontinued the action as against the Hansa Line and Funch, Edye & Co. Such per-

mission, however, was granted on the distinct condition that the discontinuance "would not amend the complaint at all, the complaint stands as it is." The Court then stated that the complaint would stand as if it alleged precisely what was then contained in it (pp. 51, 52). That, of course, meant that the complaint, notwithstanding the dismissal, still alleged that the injury complained of had arisen from acts done since the admission of the Hansa Line in 1901, certainly since the date of Exhibit B (*ante*, p. 8).

The plaintiffs on the new trial asked to amend the seventeenth article so as to charge that the plaintiffs had been injured by two combinations: first, by a combination composed of all the defendants except the Hansa Line prior to November, 1901, and second, by the defendants together with the Hansa Line and Funch, Edye & Co., after 1901 (p. 53). The defendants objected to this amendment during the trial, six years after the filing of the complaint, and informed the Court that they had prepared for trial only upon the cause of action originally alleged, and that they were unable to consult with clients with regard to the new charge, which covered the period from 1898 to 1901; and, on the amendment being granted over their objection and exception, moved for leave to withdraw a juror. To the denial of this motion, the defendants duly excepted (p. 52).

The amendment permitted the plaintiffs to introduce evidence of a very large number of transactions, shown in Plaintiff's Exhibit A 2, pages 181-188 which were not within the scope of the complaint until this amendment was made. Fully two-thirds of the total amount of the claims there set forth for alleged excessive freight charges arose prior to November 1, 1901. Fully two-thirds of the verdict was doubtless due to such claims beyond the scope of the complaint upon which defendants' counsel prepared for trial.

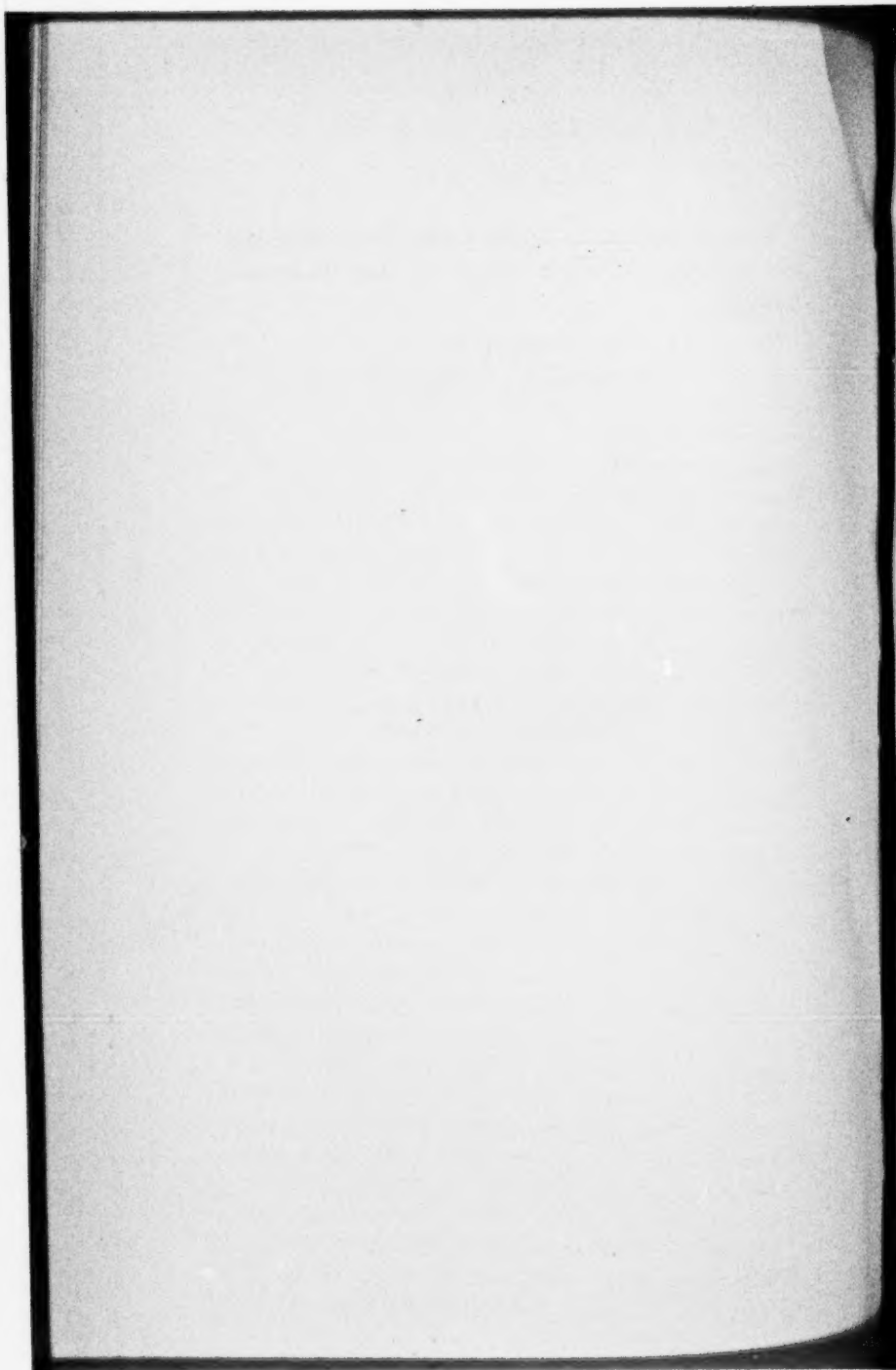
LAST POINT.

The judgment appealed from should be affirmed, with costs to the defendants.

CONVERS & KIRLIN,
Attorneys for Defendants in Error.

J. PARKER KIRLIN,
THOMAS THACHER,
CHARLES R. HICKOX,
Counsel.

New York, April, 1914.



FILED

OCT 16 1916

JAMES D. MAHER

CLERK

Supreme Court of the United States.

No. 2.

OCTOBER TERM, 1916.

HUGO ADELBERTO THOMSEN *et al.*,

Plaintiffs-in-Error

(Plaintiffs at trial).

VS.

SIR CHARLES W. CAYSER *et al.*,

Defendants-in-Error

(Defendants at trial).

**SUPPLEMENTAL BRIEF FOR DEFENDANTS-IN-ERROR ON REARGUMENT
ORDERED BY THE COURT.**

CONVERS & KIRLIN,

Attorneys for Defendants-in-Error.

J. PARKER KIRLIN,
THOMAS THACHER,

Counsel.



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THE UNITED STATES OF AMERICA

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Supreme Court of the United States.

No.

OCTOBER TERM, 1916.

HUGO ADELBERTO THOMSEN
et al.,
Plaintiffs in Error,
(Plaintiffs at Trial),

VS.

SIR CHARLES W. CAYSER *et al.*,
Defendants in Error,
(Defendants at Trial).

**SUPPLEMENTAL BRIEF FOR DEFENDANTS
IN ERROR ON REARGUMENT ORDERED
BY THE COURT.**

This case is presented to the Court under peculiar conditions.

It comes up on writ of error to the Circuit Court of Appeals, issued at the instance of the plaintiffs, to review a judgment of that Court reversing a judgment for the plaintiffs after trial by jury in the Circuit Court, and directing a dismissal of the complaint. The action of the Circuit Court of Appeals in directing a dismissal of the complaint, instead of ordering a new trial, was taken

at the instance of the plaintiffs. That Court, having found error in the proceedings at the trial, reversed the judgment and ordered a new trial (Record, p. 206). But thereafter, August 28, 1911, the plaintiffs filed a petition for rehearing, giving as grounds therefor "that the plaintiffs herein are satisfied to have a decision finally determining the questions as presented in the case upon its record as now existing in the files of this Court"; and saying further: "They are satisfied with the present record of the case on appeal"; and ending with this prayer:

"Wherefore plaintiffs pray for a rehearing of the present case, and that upon such rehearing being had, *judgment final be rendered upon the record*, or questions of law, such as are presented by the case upon the record as it stands, be certified to the Supreme Court for final decision thereon" (Record, pp. 207-209).

On October 23, 1911, the Circuit Court of Appeals made a decision as follows:

"We understand from the petition of the plaintiffs below that they do not desire to present additional testimony *and do not wish a new trial of this action*. We understand also that they are willing to stand on the record as made, and that *they prefer instead of a decision granting a new trial, a decision reversing the judgment and directing the Circuit Court to dismiss the complaint* in order that they may carry the case to the Supreme Court, without further delay. If we are correct in this supposition, we are prepared to recall the mandate, order a rehearing, *reverse the judgment and direct the Circuit Court to dismiss the complaint*" (Record, p. 210).

On November 15, 1911, the plaintiffs' attorneys wrote to the Clerk asking him to enter an order granting a rehearing and recalling the mandate of the Court in accordance with their petition (Record, p. 210). Their letter was endorsed by the Clerk, "Election by defendant in error", evidently being understood to be an acceptance of the suggestion contained in the above decision. Thereupon, on November 16, 1911, the Circuit Court of Appeals made the order which is now here for review (in accordance with the suggestion of its decision of October 23, 1911, accepted by the plaintiffs), vacating the previous order (which reversed the judgment of the Circuit Court and ordered a new trial), and instead thereof reversing said judgment and ordering a dismissal of the complaint (Record, p. 211).

Nothing more appears in the record until four months later when on March 15, 1911, the plaintiffs filed their petition for writ of error.

[It appears from the papers on motion to dismiss that in the meantime the mandate had gone down and the Circuit Court, in accordance therewith, had dismissed the complaint and so ended the action, no appeal being taken from its judgment to this effect; but this brief does not relate to the motion to dismiss.]

The plaintiffs' assignment of errors does not criticize the Circuit Court of Appeals for directing a dismissal instead of a new trial; after deciding that the judgment must be reversed. The plaintiffs insist that the judgment should have been affirmed; but do not claim that, if it was right to reverse the judgment, it was wrong to direct a dismissal instead of a new trial. Indeed they were estopped from doing so, because this substitution

was at their instance and with their assent. They made known to the Court, after it had ordered a new trial, that they preferred a dismissal, and the Court made the substitution accordingly.

So, it seems to us, the sole question is, whether the judgment of the Circuit Court should have been reversed. If it should have been, then we submit that the judgment brought here for review must be affirmed.

And so the peculiarity of this hearing appears. For although nominally it is upon the plaintiffs' assignment of errors, substantially it is upon the defendants' assignment of errors upon which the case was heard in the Circuit Court of Appeals. We submit that if the record shows any error in the proceedings at the trial such as to call for a reversal of the judgment of the Circuit Court (which is within defendants' assignment of errors) the order appealed from must be affirmed—and this whether or not such error was commented upon in the opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals, in its opinion, specifies only one ground of reversal, that the trial Court erred "in holding as matter of law that the combination shown was in violation of the statute", the majority of the Judges finding it impossible to hold as matter of law "that the acts of the defendants as disclosed upon the record amount to a combination in *unreasonable* restraint of trade." But if this Court should be of opinion that in this regard there was no sufficient ground for reversal, it could not, we submit, for this reason alone, reverse the order appealed from, disregarding other errors assigned by the defendants. If the record sustains the contention of the defendants as to any error assigned by them, this Court must, we submit,

affirm, though the opinion of the Circuit Court of Appeals is silent about such error. It is the order and not the opinion which is here in question. A judgment or an order which is right does not become wrong because the Court, in the opinion which it files, gives the wrong reason for it.

Our main contention relates to the error specified in the opinion; but other errors were assigned by the defendants to which attention will be called, because of which we insist that the order of the Court of Appeals was right, even if this Court should reject the view stated in the opinion.

To use the words of the Chief Justice in *Interstate Commerce Com. v. Ill. Cent. R. R. Co.*, 215 U. S. 471, this Court "must decide whether the action of the Court below was right irrespective of the reasoning by which such action was induced."

The Court cannot, we submit, reverse the order of the Circuit Court of Appeals and affirm the judgment of the Circuit Court in the plaintiffs' favor, unless after consideration of every error assigned by the defendants, this Court shall find that the trial judge committed no error to their prejudice in his charge or in rulings as to the law, in admitting or excluding evidence, or in withholding from the jury questions which it was for the jury, and not the Court, to decide. In other words, every claim of error by the defendants must be passed upon adversely, if the plaintiffs are to be given any relief upon this appeal.

POINTS.

I.

It was error for the trial Court to hold as matter of law, "that the combination shown was in violation of the statute" or, in other words, "that the acts of the defendants as disclosed upon the record amount to a combination in unreasonable restraint of trade."

A.

The Judge's Rulings.

In his charge, the Judge said:

"Now, gentlemen, as regards the asserted combination, the only testimony is not conflicting, and considering it together with the printed circulars, Exhibits A and B in evidence, and I think an unlawful combination such as the Sherman Act condemns is fairly proven by the plaintiffs. Hence, I instruct you as a matter of law, that the defendants in violation of the anti-trust statute entered into a conspiracy or unlawful combination in restraint of foreign trade and commerce." (Record, p. 158.)

See defendants' assignment of errors, Fifteenth (Record, p. 195).

See also defendants' assignment of errors, Eleventh, as to motion to dismiss at close of plaintiffs' case and renewal thereof after testimony was completed (Record, p. 195), and also defendants' assignment of errors, Twelfth and Thirteenth, as to refusal to direct a verdict (Record, p. 195).

The Court also charged as follows:

"Evidence was given by the plaintiffs tending to show that conferences were held in this country to determine what the carrying rate should be, and that the agents or representatives of the lines in the combination reported their action to the London office or to their principals. *This, in my judgment under the law, makes the agents liable*, especially as they concededly profited by the violation complained of" (Record, p. 159).

The defendants duly excepted, and this part of the charge was assigned as error in assignment of errors Nineteenth (Record, p. 197).

So the Judge instructed the jury, as matter of law, that the defendants, those finally in the case, "in violation of the anti-trust statute, entered into a conspiracy or unlawful combination in restraint of foreign trade and commerce," and, substantially, that the agents were liable for any injury to plaintiffs by reason of such conspiracy or combination.

If the record fails to show such facts as warranted such instructions, by evidence not conflicting and which left nothing to inference, there was error calling for reversal. If evidence was lacking upon any point essential to determine whether there was an illegal combination, or whether the defendants, or any of them, were parties to it, or if the evidence answered either of these questions in the negative, the charge was not warranted. If the evidence as to any facts essential in order to determine whether there was an illegal combination, or whether the defendants were parties to it was conflicting or required inferences of fact to be drawn in order to reach a conclusion, a question of fact was pre-

sented which should have been left to the jury, and therefore the charge was not warranted.

The proposition that in a common law action it is for the jury and not the judge to draw inferences of fact, as well as to pass upon questions of fact arising upon conflicting evidence, hardly needs citation of authorities. But see Abbott's Civil Jury Trials (3rd ed.), page 500, where it is said:

"Since inferences are the logical means of arriving at the fact proved by the evidence, they constitute decision of facts and therefore belong to the jury."

The Circuit Court of Appeals (see opinion, Record, p. 203) found it impossible to hold as matter of law "that the acts of the defendants as disclosed upon the record amount to a combination in unreasonable restraint of trade." If that was impossible for the Circuit Court of Appeals, it was equally so for the Judge at the trial; and yet he so held.

The opinion of the Circuit Court of Appeals does not make it clear whether it was found impossible to hold as above stated, because the Judges read the evidence as showing that there was no illegal combination or because they found a lack of evidence upon some point essential in order to determine whether there was an illegal combination or not, or because the determination of that question depended upon questions of fact to be answered by weighing evidence or drawing inferences, which only the jury could do. If it was impossible, for any of these reasons, for the Judges of the Appellate Court so to hold, clearly the trial Judge erred in holding as he did, and a reversal of the judgment was required.

B.

The combination assumed to be shown could not properly be held by the Judge to be unlawful merely because it appeared that thereby competition between the parties was eliminated or restricted.

The charge now under review was based upon the opinion of the Circuit Court of Appeals when the case was before it after the first trial (166 Fed. 251). The Court then held, because of its understanding of the previous decisions of this Court, that any combination with respect to interstate or foreign trade, which eliminated or restricted competition between the parties thereto, was illegal under the act; or, in other words, that restraint of competition is necessarily restraint of trade or commerce under the act, without regard to economic purposes or effects.

We insist, as the Circuit Court of Appeals now concedes, that its understanding of the previous decisions of this Court was erroneous. We also insist that, in accordance with reasonable construction in the light of the history of the act, restraint of competition is not necessarily restraint of trade; that it is not so (as recognized even in the opinion in the Joint Traffic Association case), unless it is unfavorable to trade or commerce, or, in other words, is unreasonable and prejudicial to the public interests.

See our original brief, pp. 25 to 30.

That the Circuit Court of Appeals now takes the view for which we contend and understands, as we do, that this Court has confirmed it, is shown not only by its opinion on the second appeal in this

case (Record, p. 203), but also by later decisions of the same Judges in other cases.

U. S. v. Hamburg American S. S. Line,
216 Fed. 971.

U. S. v. Prince Line, *U. S. v. American-Asiatic S. S. Co.*, 220 Fed. 230.

The same view has been taken by other Federal Judges.

U. S. v. U. S. Steel Co., 223 Fed. 55;

Patterson v. U. S., 222 Fed. 599;

U. S. v. United Shoe Machinery Co., 222 Fed. 349;

U. S. v. International Harvester Co., 214 Fed. 987;

U. S. v. Keystone Watch Case Co., 218 Fed. 502.

C.

The combination assumed to be shown could not properly be held by the Judge to be unlawful unless it appeared by unconflicting testimony, without resort to inferences of fact therefrom, that by reason of its intent or its inherent nature it prejudiced the public interests by unduly restricting competition or unduly obstructing the course of trade.

We use here the language of this Court in its opinion in *Nash vs. U. S.*, 229 U. S. 373, 376, in which speaking of the *Standard Oil* and *Tobacco* cases, Mr. Justice Holmes says:

"Those cases may be taken to have established that only such contracts and combinations are within the act, as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly

restricting competition or unduly obstructing the course of trade."

This was but a slightly different form of stating what was said by the Chief Justice in the *Tobacco* case, in speaking of the *Standard Oil* case, as follows:

"Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil* case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance" (221 U. S. 179).

Lawyers and Judges have ceased trying to find out the meaning of the Anti-Trust Act by studying its language; and have turned their study upon the language of this Court concerning it. The declarations made in the *Standard Oil* and *Tobacco* cases, were of the most solemn kind and were made after elaborate arguments and long consideration, and with a knowledge that an authoritative statement of the meaning of the act was awaited with intense interest. They were intended to make the meaning clear. A little later these declarations were construed in the opinion in the *Nash* case by the concise statement above quoted. May we not confidently rely upon it as a final declaration, so far as it goes, as to what this act does and does not condemn?

The opinion in the *Nash* case came after the decision in *U. S. v. Terminal R. R. Ass'n of St. Louis*, 224 U. S. 383, and *U. S. v. Union Pacific Railway Co.*, 226 U. S. 61.

In the *St. Louis Terminal* case the question was whether the combination of terminal properties was "a facility in aid of interstate commerce" or was prejudicial to the public interest. Largely because of physical conditions it was decided that it was prejudicial to the public interests unless the door was opened to other carriers.

In the *Union Pacific* case the acquisition of a line of road which would compete with a projected line of the Union Pacific was approved, and the combination between the Union Pacific and Southern Pacific was disapproved, because they were held, contrary to the view of the lower court, to be in competition as to transcontinental business. The union in this case was an unnatural one, as in the *Northern Securities* case, which it was held tended "to less activity in furnishing the public with prompt and efficient service."

In both these cases the *ratio decidendi* was the prejudice to the public interests; and so there was nothing in the declaration in the *Nash* case, inconsistent with what had been decided in them.

The language quoted from the *Tobacco* case and the affirmance thereof in the *Nash* case was mentioned in *Eastern States Lumber Association v. U. S.*, 234 U. S. 600, 609, 610.

The opinion of the Chief Justice in *U. S. v. Terminal R. R. Ass'n of St. Louis*, 236 U. S. 194, seems further to show that the quotation from the *Nash* case correctly states the view of the Court at this time.

It is said that only such combinations are within the act as prejudice the public interests—which is

the same thing as was conceded by Mr. Justice Peckham in the Joint Traffic Association case, that only such combinations are condemned as are unfavorable to trade or commerce—that is, to trade or commerce generally, not to the trade or commerce of any one or more individuals, but to trade or commerce as a whole and to the interests of the public therein.

See our original brief, pp. 26 and 27.

A combination to come under the condemnation of the act must prejudice the public interests either by unduly restricting competition or by unduly obstructing the course of trade. The combination must be found not simply to restrict competition, but to restrict competition *unduly*, that is to such extent and in such manner as to prejudice the public interests; or it must be found not simply to obstruct the course of trade, but to obstruct the course of trade *unduly*, that is to such extent and in such manner as to prejudice the public interests.

The word "unduly" and the word "unreasonable" as applied to restraint of trade, are obviously used with reference to the public interests. To restrict competition unduly is to restrict competition to the injury of the public. Restriction of competition by the union of competing carriers, is not undue, unless the effect of it is *to injure the public*, by a reduction of transportation facilities. A restriction of competition which does not have this effect is not undue or unreasonable and is not prejudicial to the public interests, and cannot be made a basis of attack upon a combination under the act. An obstruction of the course of trade is not undue, unless the result is *to injure the public*, by decreasing

the facilities open to the public for trade or commerce, leading to a diminution of exchange of commodities or less favorable conditions for the development of trade or commerce. The emphasis is now put by the decisions of this Court upon the words "unduly" and "unreasonable", and these words are used with relation to the *public interest*.

And it must appear, in order to bring a combination under the condemnation of this act, that it is prejudicial to the public interests "by reason of intent or the inherent nature of the contemplated acts". So in this case to justify the charge of the Judge, it must have appeared, from undisputed evidence and without inferences of fact, either

- (1) that the defendants intended to restrict competition or obstruct the course of trade *unduly*, that is, so as to prejudice the public interests; or
- (2) that the inherent nature of their contemplated acts was such that they must or naturally would restrict competition or obstruct the course of trade unduly, that is, so as to prejudice the public interests.

That competition between the parties is eliminated is nothing, unless the combination is unfavorable to trade and commerce, or, in other words, unless the intended or natural result of what is done is to diminish rather than develop the facilities for trade and commerce to the prejudice of the public generally.

And in respect to carriers, the important consideration is, whether what is questioned is favorable to the exchange and distribution of commodities.

The words "trade and commerce" cover the exchange and distribution of commodities, including

transportation as an aid to such exchange and distribution, and, more generally, commercial intercourse. All this is included in the meaning of the word "commerce" as used in the Constitution. While this is undoubtedly true, so that all agencies of interstate and foreign transportation are brought within the power to regulate, that which is the ultimate concern in the grant of power and in the exercise of such power by the Anti-Trust Act is the exchange and distribution of commodities.

This was recognized by Mr. Justice Peckham in the *Joint Traffic Association* case (171 U. S. 505), in which, conceding the underlying question to be, whether the arrangement there under consideration was favorable to commerce or unfavorable and in restraint of that commerce, he held it to be unfavorable because of its effect upon "*the demand for commodities*".

The interests of those engaged in transportation are of public concern in like manner as the interests of those engaged in other kinds of business. But the paramount interest of the public is in the efficiency of the service which they render to the public in transporting freight and passengers in aid of commercial intercourse. And this is recognized in the *Union Pacific* case (226 U. S. 61, 88), in which it is said, as against the legality of the union of the Union Pacific and the Southern Pacific, that "it directly tends to less activity in furnishing the public with prompt and efficient service". And in the *St. Louis Terminal Association* case (224 U. S. 383, 394), the question as to combination of terminal facilities was, as stated by Mr. Justice Lurton, "whether it is a facility in aid of interstate commerce or an unreasonable restraint forbidden by the Act of Congress".

D.

The charge and rulings of the Court were not justified because the assumed combination was not shown by the allegations of fact contained in the complaint to have such character as to bring it under the condemnation of the act.

The existence of a combination condemned by the act is the fundamental fact to be shown by allegations of fact in the complaint and by proofs. The burden was, of course, upon the plaintiffs to properly show by their allegations and to prove such fundamental fact. Allegations and proof of some kind of combination would be of no consequence, unless followed by allegations of fact and proofs showing that such combination was illegal under the act.

The complaint was wholly insufficient in this respect (see statement "The substance of the Complaint and the Issues" in original brief, pp. 5-14). There were no facts alleged from which it could be found that it was the intent or inherent nature of the acts contemplated by the combination to restrain competition or to obstruct the course of trade unduly to the prejudice of the public interests. And, although the complaint was amended at the trial (see original brief, p. 14) no effort was made to remedy this defect. We insist that because of the insufficiency of the complaint, without more, the Judge erred in refusing to dismiss at the close of the plaintiffs' case, and at the close of the whole case and in charging as he did. But we need not argue this point at length because the proofs were even more defective than the allegations of the complaint.

E.

The charge and rulings of the Court were not justified because the proofs wholly failed to show that the assumed combination was of such a character as to bring it under the condemnation of the act.

If the existence of a combination and participation therein by the defendants be assumed to have been proved, it certainly was not proved that such combination, by intent or the inherent nature of its contemplated acts, prejudiced the public interests by unduly restricting competition or unduly obstructing the course of trade.

That must have been proved to justify the Court in holding as matter of law that the combination was illegal. The plaintiffs sue for damage by reason of an illegal combination. Proof, not simply of a combination, but also of its illegality under the act was fundamentally necessary. The burden of giving such proof was upon the plaintiffs. If such proof was lacking the charge of the Judge was clearly erroneous and the judgment was rightly reversed by the Circuit Court of Appeals.

As to the proofs we refer to pages 15 to 20 of our original brief, and we also refer to our argument therein on pages 31-36 of that brief.

We submit that the evidence does not show that the assumed combination was intended to or that its inherent nature was such as to prejudice the public interests in any way; or to unduly restrict competition or to obstruct the course of trade unduly, to the prejudice of the public interests, or that its intent or natural working involved any unreasonable restraint of trade, or that it was unfavorable to trade or commerce in any respect. We submit that the proofs show quite the contrary.

But it is not necessary to establish this last proposition. The illegal character of the combination was required to be shown by the plaintiffs. If it simply fails to appear whether the combination was of such character as to bring it under condemnation, if, in other words, it cannot be told from such evidence whether it was or was not illegal, that is enough for the present purpose. In such case the charge was erroneous. And so it was if there was any question of fact involved in determining the character of the combination to be answered by weighing evidence or drawing inferences of fact from facts proved or admitted, because such a question is for the jury.

In this connection we would refer to the case of *U. S. v. American Asiatic S. S. Co.*, 220 Fed. 230, 235, which related to arrangements of ship owners similar to that charged in this case. The suit was dismissed.

Judge Lacombe, giving the opinion of the Court (composed of all the Circuit Judges), said:

"The acts complained of are the usual ones, conferences, agreements, pooling arrangements, regulation of number of vessels employed, of ports visited, and of sailing dates, regulation of rates, provisions for rebates, not secret but open to all and uniform, etc. All of these, or some of them, it is contended, constitute a restraint of trade and an attempt to monopolize under the act. From a study of the multitudinous decisions, not always harmonious, construing this act, the conclusion is reached that a violation of the act is not made out by theories of what will be the result upon trade and commerce of agreements entered into by defendants, or upon presumptions as to what may have been done under such agreements. Some actual unreasonable interference with the

natural course of trade must be shown by proof."

See also the similar case of *U. S. v. Prince Line*, decided at the same time by the same Judges, and also the language of Judge Lacombe in *U. S. v. Hamburg-American S. S. Co.*, 216 Fed. 971, and the report of a Committee of the House of Representatives, which is therein referred to.

F.

The charge and rulings of the Court were not justified because it did not appear by undisputed evidence that defendants who acted as agents or indeed the defendants of the firm of Cayser Irvine & Co. were parties to the assumed combination.

The combination which is inferred from the proofs was made in London and the agents had nothing to do with the making of it; and they had nothing to do with the business of the combination—so far as any combination appears—except severally to carry out the instructions of their several principals sent from London. The proofs show that they were not parties to any such combination.

See original brief, pp. 42-45 and 62-67.

And as to the firm of Cayser Irvine & Co., see original brief, pages 62 *et seq.*

If there was any evidence tending to show that these agents or Cayser Irvine & Co. participated in the combination, there was certainly evidence to the contrary. Upon conflicting evidence it was for the jury to decide; the Judge could not properly usurp the functions of the jury. Yet he charged that the defendants left in the case were parties to the

combination and that the agents were liable; and practically left nothing to the jury except the amount of the liability.

But we go further, and submit that there is no evidence "tending to show that conferences were held in this country to determine what the carrying rate should be and that their agents or representatives of the lines in combination reported their action to the London office or to their principals" (see Charge, Record, p. 159)—at least in any such sense as to lead to the conclusion that it made the agents parties to the combination, and so liable herein. The evidence clearly shows that there were no conferences of the combination on this side of the ocean. There were only informal conferences of the agents, which determined nothing as to the carrying rate, and there was no action of the agents determining what the carrying rate should be and, of course, no report of such action to the London office or to their principals. The several agents sometimes made suggestions to London, but usually they were not adopted. The agents certainly, as the evidence shows, had no power "to determine what the carrying rate should be", and did not assume to have any. They simply carried out severally the instructions which they received from their several principals.

G.

The assumed combination could not have been illegal under the act because it was formed, if it may be assumed to have been formed anywhere, beyond the jurisdiction of the United States and so beyond the reach of the act.

See original brief, pp. 44-46.

The existence of an illegal combination is the basic necessity of the plaintiffs' case. They sue under Section 7 which provides for the recovery of damages for injury "by reason of anything forbidden or declared to be unlawful by this act." Of course, they must allege and prove some particular thing which they claim to be so illegal. The only thing they allege in this regard is entering into a contract or agreement and forming an illegal combination and conspiracy in restraint of trade, etc., and combining and conspiring and forming a scheme or agreement for suppressing competition, etc. (Paragraph Eleventh, pp. 7, 8). These are not sufficient as allegations of fact; but they show what is the something claimed to be illegal under the act by reason of which they claim to have been injured. It is that and that only. But so far as the proofs indicate, whatever contract or agreement was made was made in London, whatever combining or conspiring there was was there, whatever scheme was formed or agreement was made was formed or made in London, and the plan was carried out there. What was done in this country was done by the agents under instructions from their several principals who got together in London. Whatever of combination there was was a foreign combination. Such combination, the getting together of ship owners in London, is the only thing set up as illegal under the act, as a basis of recovery for injury "by reason of anything forbidden or declared to be unlawful by this act." But what was done in London could not be made illegal by any act of our Congress.

If the same ship owners had in London formed a complete partnership or united in organizing a corporation, transferring their ships, and intending that they should be operated by the part-

nership or corporation partly in carrying freight from New York to South Africa, could the legality of what they did have been questioned under the Sherman Act? If they had done less than this, by simply agreeing in London to operate some of their ships, for carriage from New York to South Africa, under a joint agency located in London which should direct as to sailings, rates, etc., could the legality of such agreement be questioned under this Act? But the combination here assumed to have been proved did not go even so far as this. The getting together was in London, with the result that the several ship owners from London sent like instructions to their several agents in New York. No one here combined in any way. The agents here simply followed the instructions of their several principals in London. The so-called "Conference" was in London; the agents here had no part in it. What it did, it did in London; and the legality of what it did there cannot, we submit, be affected by any law of the United States.

II.

The judgment of the Circuit Court was rightly reversed, though it be assumed that the proofs showed a combination illegal under the act in which the defendants participated, because they did not show injury to the plaintiffs by reason thereof.

This point, although fully presented, was not discussed in the opinion of the Circuit Court of Appeals. It was barely touched upon in the opinion

upon the first appeal, notwithstanding that it was the ground upon which the suit was dismissed by Judge Hough at the first trial. But this does not bar us from pressing it here (*ante*, pp. 4, 5), which we do with full confidence in its soundness for the reasons stated in our original brief.

We have nothing to add to what is on pages 49-62 of our original brief, except to say that for this reason it was error to deny the motions for dismissal made at the close of plaintiffs' case and again at the close of the whole case (Defendants' Assignment of Errors, Eleventh, p. 195), and to refuse to direct a verdict for all the defendants (Defendants' Assignment of Errors, Twelfth and Thirteenth, p. 195), and to refuse to direct a verdict for Barber & Co. (Defendants' Assignment of Errors, Fourteenth, p. 195), and to refuse to charge as requested in manner as shown in Defendants' Assignment of Errors, Twenty-second, page 198; and that it was also error to charge generally that the agents were liable, leaving the jury only to determine the amount of liability (Record, p. 159; Defendants' Assignment of Errors, Nineteenth, p. 197).

III.

It was error, calling for reversal, to charge and to refuse to charge (in respect to the method to be followed by the jury in determining what plaintiffs' injury was) as the Judge did, referred to in the Fifth and Sixth points in our original brief (pp. 68-76).

IV.

It was error, calling for reversal, to permit the plaintiffs to amend the complaint during the trial.

See Point Seventh, pp. 76-78, of original brief.

LASTLY.

For all the reasons shown herein and in our original brief, we submit that the judgment in the Circuit Court was rightly reversed, and that for this reason, since the substitution of a dismissal for a new trial was made at the instance of the plaintiffs, the order appealed from was wholly right and should be affirmed.

**J. PARKER KIRLIN,
THOMAS THACHER,
Counsel for Defendants in Error.**

Office Supreme Court, U. S.

FILED

APR 25 1914

JAMES D. MAHER

CLERK

SUPREME COURT OF THE UNITED
STATES.

OCTOBER TERM, 1914

No. 2

HUGO ADELBERTO THOMSEN *et al.*,
Plaintiffs-in-Error,

AGAINST

SIR CHARLES W. CAYZER *et al.*,
Defendants-in-Error.

Defendants in Error
BRIEF FOR PLAINTIFFS IN ERROR ON
MOTION TO DISMISS OR AFFIRM.

The facts disclosed in the moving papers, in brief, are these:

The final order of the Circuit Court of Appeals, to which the present writ of error was taken, was entered November 16, 1911. *Record*, p. 211. A mandate was issued in pursuance of the judgment, addressed to the Circuit Court, directing that court to enter an order dismissing

the complaint in the action. The mandate was filed in the Circuit Court for the Southern District of New York November 24, 1911, and a judgment in accordance with the mandate was entered in that court on that day. *Motion Papers*, fol. 24; *Judgment, Motion Papers*, pp. 9-13. A copy of the judgment so entered was served on the plaintiffs' attorneys on November 24. *Motion Papers*, fol. 24.

The term of the Circuit Court at which the judgment of dismissal was entered expired on the first Tuesday of January, 1912, at which date, in accordance with the Judiciary Act of March 3rd, 1911, Section 97, the first term of the United States District Court for the Southern District of New York, which succeeded to the business of the Circuit Court for that district, began. *Motion Papers*, fol. 25.

No steps were taken by the plaintiffs, either to appeal from the judgment of the United States Circuit Court of Appeals, nor from the judgment entered in the Circuit Court in pursuance of the mandate of the Circuit Court of Appeals prior to the expiration of the term at which the judgment was entered. Nor was any application presented prior to the expiration of the term, for a stay or recall of the mandate of the Circuit Court of Appeals. *Motion Papers*, fol. 27.

The plaintiffs filed a petition for a writ of error to the judgment of the Circuit Court of Appeals, and obtained an order allowing the writ, on March 15, 1912, more than two months after the

expiration of the term in which the judgment of the Circuit Court, entered on the mandate of the Circuit Court of Appeals, had been filed and entered. No application was made to the Circuit Court of Appeals before or after the allowance of the writ of error to recall the mandate, or referring in any manner to the judgment of the Circuit Court that had been entered on November 24, 1911, in pursuance of the mandate. All that the plaintiffs requested was a stay of further proceedings on the part of the defendants for the enforcement of the judgment of the Circuit Court of Appeals. *Motion Papers*, fols. 27-28. That stay amounted to nothing because the judgment of the Circuit Court of Appeals had already become executed by the issuance of its mandate and the entry of judgment in the Circuit Court thereon.

The plaintiffs have not sued out any writ of error to the Court of Appeals from the judgment of the Circuit Court the 24th of November, 1911. That judgment stands of record in the Circuit Court as a final disposition of the controversy between the parties. The time to appeal from it has expired, and neither this Court nor the Circuit Court of Appeals nor the Circuit Court has any power to set it aside. *In re Metropolitan Trust Company*, 218 U. S. 312.

The plaintiffs, in order to preserve their rights, and keep the case open so as to leave room for the entry of a judgment in the Circuit Court in

pursuance of the writ of error sued out by them to the judgment of the Circuit Court of Appeals, should either have moved in the Circuit Court to vacate the judgment before the term in which it was entered expired, or, within the time allowed by law, should have sued out a writ of error to the judgment to the Circuit Court of Appeals, and, upon the dismissal of such writ of error, should have sued out a further writ from the action of the Circuit Court of Appeals, dismissing the second appeal, so that appeals from both the judgments could have been presented to this Court, as was done in the case of *Merrill v. National Bank of Jacksonville*, 78 Fed. Rep. 208, 173 U. S. 131. Dealing with the question of practice there involved, Mr. Chief Justice Fuller, at page 134, said:

"The Circuit Court of Appeals reversed the decree of the Circuit Court with specific directions. Nothing remained for the Circuit Court to do except to enter a decree in accordance with the mandate, and for the purposes of an appeal to this court the decree of the Circuit Court of Appeals was final. The mandate went down and the Circuit Court entered its decree in strict conformity therewith before the appeal in No. 54 was prosecuted to this court. This promptness of action did not, however, cut off that appeal, and any difficulty in dealing with the cause in the Circuit Court was obviated by the second appeal, which brings before us in No. 55 the record subsequent to the first decree of the Circuit Court of Appeals."

The practice followed in the Merrill case was recognized as proper in *Singer Manufacturing Company v. Adams*, 185 Fed. Rep. 768.

This Court decided in the case of *In re Metropolitan Trust Company*, 218 U. S. 312, that a court cannot deal with a decree other than for correction of clerical error or inadvertence after the termination of the term at which it was entered. Apparently, therefore, no court now has power to vacate, modify or annul the judgment of the Circuit Court which finally disposed of the controversy between the parties. Unless two final judgments can be entered in the case in the same court, disposing of the same controversy, there appears to be no room for the entry of a further judgment in the Circuit Court based on any action which this Court might take under the present writ of error.

A further question presented by the motion is: Can this Court hear an appeal from a judgment entered against the plaintiffs, on their consent, where it would have no jurisdiction to review the judgment which that court had entered on the merits, and subsequently modified, on the plaintiff's consent, and at their request?

The judgment which the Circuit Court of Appeals first entered on the merits, expressing its conclusion as to the proper disposition of the case, merely ordered a new trial. *Record*, p. 206. Plaintiffs then moved for a rehearing, and, in connection therewith, asked the Court to re-

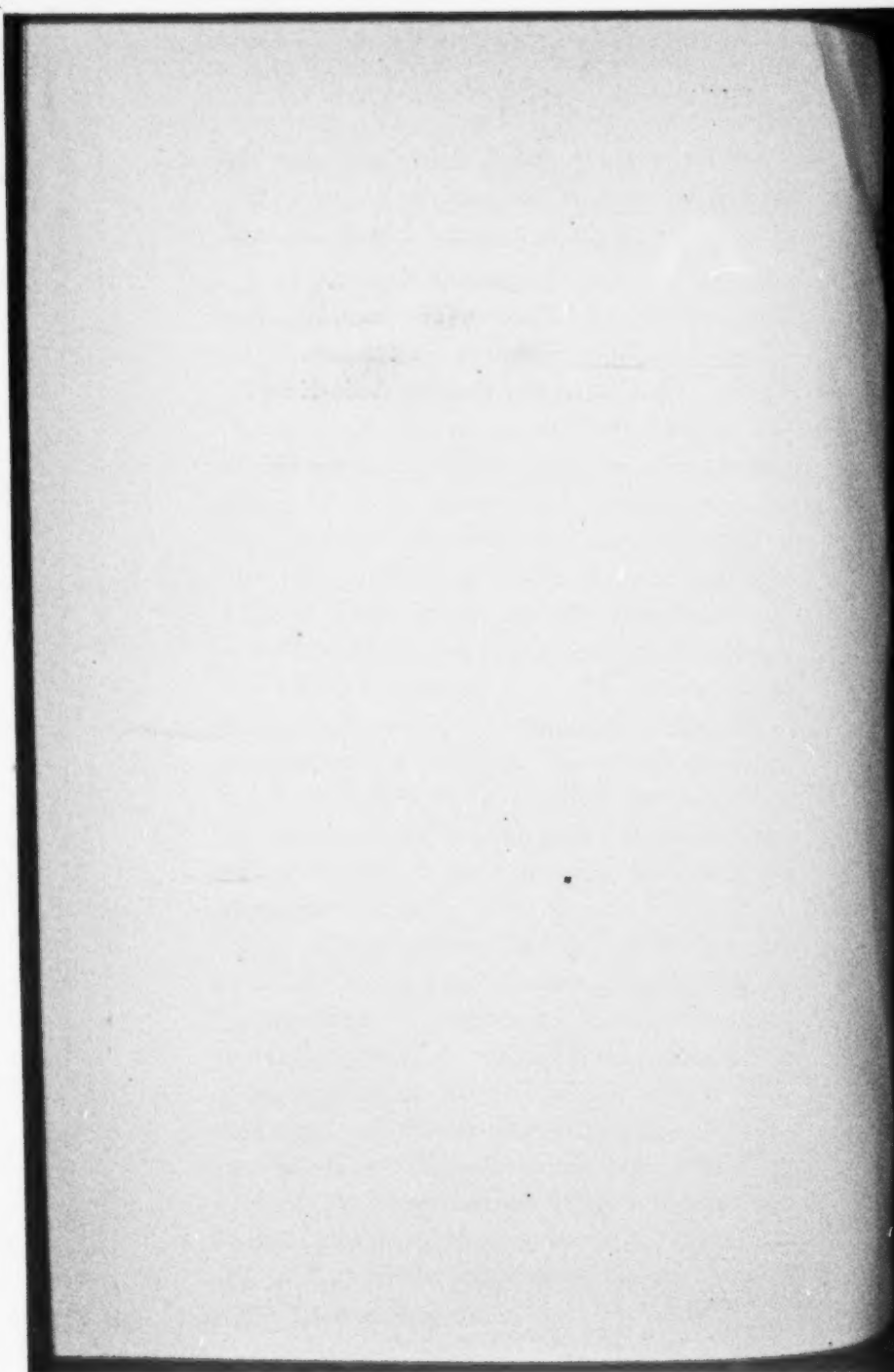
consider its decision ordering a new trial, further praying that, if the Court should not conclude, on such rehearing, to affirm the judgment as it stood in favor of the plaintiffs, then that it should direct the Court below to enter final judgment against the plaintiffs. Pp. 207, 210.

The Circuit Court of Appeals filed a short memorandum, stating its understanding of the purport of the application to be as above stated, adding "If we are correct in this supposition, we "are prepared to recall the mandate, order a "rehearing, reverse the judgment and direct the "Circuit Court to dismiss the complaint." P. 210. Plaintiffs' counsel thereupon wrote a letter to the Clerk, requesting that the rehearing be granted and the mandate recalled. The Court then entered the judgment complained of, reversing the judgment of the Circuit Court and directing that the cause be remanded to that court, with instructions to enter an order dismissing the complaint. P. 211.

This Court would have had no jurisdiction to entertain an appeal from the first judgment of the Circuit Court of Appeals on the merits, which directed a new trial. *Haseltine v. Central Bank of Springfield, Mo.*, 183 U. S. 130. There is no authority in the statutes for a stipulation for judgment absolute, such as exists under the New York Code of Civil Procedure, or which authorizes this Court to hear a case that comes before it by reason only of the consent judgment which was entered in the Court of Appeals.

For the reasons stated, defendants pray that the writ of error be dismissed, or, in the alternative, that the judgment appealed from be affirmed.

J. PARKER KIRLIN,
THOMAS THACHER,
CHARLES R. HICKOX.
Counsel for Defendants-in-Error.



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United States Supreme Court

HUGO ADELBERTO THOMSEN, *et al.*,

Plaintiffs-in-Error,
Plaintiffs below,

vs.

SIR CHARLES W. CAYSER *et al.*,
Defendants-in-Error,
Defendants below.

No. 231

October Term

1913.

BRIEF IN BEHALF OF PLAINTIFFS- IN-ERROR, PLAINTIFFS BELOW.

Statement.

1. This action comes up on writ of error to the Circuit Court of Appeals for the Second Circuit issued at the instance of the plaintiffs below.

2. The action is in damages for injury to the business and property of the plaintiffs below by reason of the acts complained of in their complaint and forbidden and declared unlawful under the "Act to protect trade and commerce against unlawful restraints and monopolies" approved July 2, 1890, and known as the Sherman Act.

3. During the pendency of the suit, owing to the death of some of the defendants and owing to the change of membership in some of the other defendant

corpartnership firms and to the change of the nature of others, the action was discontinued as to some of the defendants and the trial proceeded only against the remaining defendants, Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. J. Cayser, Arthur E. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, C. J. Pollock, and John Percival, comprising the firm of Cayser, Irvine & Co.; Herbert Barber and James Barber, composing the firm of Barber & Co.; Edward N. Norton and Skeffington S. Norton, composing the firm of Norton and Son, all of whom are now the defendants-in-error before this Court.

4. The complaint alleges in substance that the defendants below (defendants-in-error herein), were engaged as carriers in the South African trade, together with other carriers mentioned in the complaint; and while so engaged entered into a combination in restraint of foreign trade and commerce in violation of that Act, by means of a scheme under which they united and called the union a "Conference" having for its object and purpose the control of the carrying trade between United States ports and South African ports. That control was intended to be effected and was actually effected by agreement between themselves not to compete with each other, to fix rates of freight to the exporting trade and to shut off outside competition.

5. The manifest method adopted by the combination in order to eliminate the possibility of competition with other outside lines, was that of coercing shippers to pay that which was equivalent to forfeit money over and above the rates of freight fixed by the Conference.

6. Each steamer employed in the Conference continued to belong and to be managed by the respective managing owner of those in that Conference, and

sometimes outside steamers were chartered by the Conference and employed in the service of the Conference in the carrying trade between this port of New York and South African ports.

7. The combination and the coercion effected thereby are mainly manifested by documentary evidence and principally by documents A and B attached and made part of the complaint and now at pages 13 and 15 respectively.

All the documentary evidence is supported by the very testimony of two of the defendants no part of the testimony relating to the combination is in controversy.

8. Exhibit A, annexed to the complaint (p. 13), is a circular dated 31st December, 1898, and issued by the *American and African Steamship Line* and the *Union Clan Line*, which are trade names adopted by the combination or Conference, at the time composed of the three remaining defendants together with a fourth one no longer in the case (pp. 47, 55, 69). That circular was printed and dated from London and issued from London; and sent to the agents here of the respective lines for distribution (p. 48). These agents are the defendants; respectively members of the firms, Norton & Son and Barber & Co. Edward N. Norton and Herbert Barber of those firms are the two defendant witnesses referred to above. "The lines represented by us, Barber & Co., and the lines represented by them, Norton & Son, first worked in conference in 1893, and they continued to work in conference, engaged in the South African trade, from that time on until June, 1903, the date of this suit" (Barber, p. 69).

To the same effect, (Norton, p. 48): "The rates of freight were 'uniform tariff rates'; they were made in London, and the agents were merely instructed to charge certain rates" (p. 47).

From and after the date of this circular "An amount of ten per cent, by defendants called primage was charged in addition to the net tariff rate" (Norton, p. 58).

The ten per cent so-called primage is the forfeit money, exacted and returnable only under the conditions imposed in the circulars, Exhibits A and B.

9. The defendants' agents were instructed from London "to refuse to take less than tariff rates plus ten per cent" (Norton, p. 58).

"Shippers who came to me here in the ordinary course of business, and offered freight to be sent, I charged them in addition to the net tariff rate ten per cent. This was subject to the circulars A and B" (Norton, p. 58).

10. By the circular, Exhibit A:

(1) Defendants offer to shippers what they call, "a commission of 10% calculated upon the *net* amount of freight at *tariff* rates."

This so-called commission, so offered to shippers, was "the exact amount charged" to them "in addition to the net tariff rates" (Norton, p. 58).

(2) Such commission was "to be computed every six months up to the 31st of January and 31st of July in each year."

(3) It was "to be payable nine months after such respective dates."

(4) And then it was payable "to those shippers *only*, who, until the date at which the commission shall become *payable*, shall have shipped *exclusively* by vessels dispatched" by these lines to South African ports.

(5) It was "not payable on the *goods* of any *consignee* who directly or indirectly imports goods by *vessels other* than those dispatched by the undernamed lines."

The circular then goes on to state more emphatically when such commissions would be so payable, viz:

"*Provided* that such shippers, either as principals or as agents have not directly or indirectly made or been interested in any shipments to any of the aforesaid ports *by vessels other* than those dispatched by the undernamed," and also,

"*Provided*, that the statement of claim for such commission shall be made *in the annexed form*, within twelve months of the date of shipments."

11. The shippers who complied or not complied with the terms of that Circular were called by defendants, "loyal" or "disloyal," respectively, and those who were in the latter class were the ones by them "penalized."

(The letter of Union Clan Line, 31 October, 1900, p. 176, explains further the scheme of defendants.)

12. During all of the years of 1899 and 1900, and up to June, 1901, the Conference succeeded in keeping away competition. Shippers had no other alternative but to ship their goods to South Africa under the conditions imposed by the defendants in that Circular Exhibit A (Summary of American Sailings, p. 180).

13. In June, 1901, the Hansa Line came into competition with the Conference lines; it had "made offerings of freight prior to July 11, 1901, when their first ship sailed. It operated a number of steamers during the period it was working outside the conference" (p. 60). The Hansa line put up four opposition steamers (Barber, p. 81).

14. While the Hansa Line was putting up those opposition steamers the Conference offered what was by it called fighting steamers at rates of freight low enough to meet the competition of the Hansa Line. But these low rates of freight were not offered to the shippers who were kept in bondage under the scheme of the Conference, but only to those who were new

comers in the trade or who had only small sums to forfeit. To those who had large sums accumulated by the payment of the 10% so-called primage far from offering any advantage the "Conference" made their condition such as to render them unable to compete with shippers who had the advantage of the competitive rates and of those offered by the fighting steamers.

Their only chance to break off from the Conference laid in the hope that the competition would last long enough to make it advantageous to them to forfeit the large sums expended or to sue for their recovery in a long and tedious litigation.

The Hansa Line, however, was admitted into the Conference on Nov. 1, 1901, and the competition ended after lasting only four months. Then the lines in the Conference consisted of the lines represented by my firm (Norton & Son), those represented by Barber & Co., and the Hansa Line, five lines in all (Norton, p. 61).

Exhibit B (p. 15) was then issued to the trade.

15. Exhibit B is dated 1st November, 1901. It is exactly worded as the previous circular, and the only difference existing between the two circulars is in dropping the trade names and in giving the correct names of all the lines forming the "Conference." It is subscribed as follows:

"Donald Currie & Co., Bucknall Steamship Lines, Ltd. Hitherto working as American and African Steamship Line."

"Union Castle Mail Steamship Company, Ltd., Cayser, Irvine & Co. Hitherto working as Union Clan Line, Hansa Steam Navigation Co. of Bremen."

16. The ostensible purpose of the issuance of the circular, Exhibit B, was that of announcing to the trade that the Hansa Line which for four months thitherto had been "working" in competition to the

"Conference" had from that date of the circular been admitted to the benefits of the Conference. See also letter, Exhibit CCC, p. 174, sent for the same purpose.

17. After the Hansa Line was taken into the "Conference," the first line that came next into competition was the Prince Line about August, 1902. The Houston Line, shortly after also came into competition with the "Conference" lines and these two lines kept up the opposition for about sixteen months, and then these two competitors were also taken into the "Conference" (p. 108).

18. The defense substantially has been that the scheme of the Conference was reasonable; that it did not charge unreasonable rates of freight; nor did it coercively require the payment of the 10% additional as primage and that the Conference although intended and formed for the purpose of suppressing competition, has not in fact restrained trade, but has developed the carrying trade between New York and South African ports.

19. The case had been already once before in the Circuit Court of Appeals under the title of "Thomsen vs. Union Castle Mail S.S. Co., in 1908, 166 F. R., 251. On that appeal the plaintiffs had appealed from a dismissal of their complaint before they had closed their case on the first trial. The Circuit Court of Appeals reversed that dismissal.

20. The new trial came on to be heard before the U. S. Circuit Court for the Southern District of New York on April 19th, 20th, 21st and 22nd and 23rd, 1909, in the Borough of Manhattan, City of New York, before the Honorable John R. Hazel, District Judge, and a jury.

21. The plaintiffs claimed to have proved on the trial three items of damages,

1st. To have been damaged in the sum of \$5600 which the plaintiffs had paid at the time of shipment as a 10% additional to the net amount of freight charged and paid by plaintiff, which sum of \$5600 the defendants refused to return on the ground that plaintiffs were thus "penalized" for having been disloyal shippers.

2nd. To have been damaged in the further sum of \$2950 for loss of opportunity to transact business on three different occasions when regular rates of freight were offered by outside carriers but for fear from actual threats of defendants to make them forfeit the great amount of moneys they then had in their hands plaintiffs could not profitably take advantage of those rates of freight.

3rd. The loss of \$6700 for having been unable to take advantage of the competitive low rates offered without the loss of the accumulated forfeits then kept by the defendants.

22. The Court charged the jury that "as regards the asserted combination the only *testimony is not conflicting* and considering it together with the printed circulars, unlawful combination such as the Sherman Act condemns is fairly proven. Hence, "He instructed them as matter of law that the defendants in violation of the anti-trust statute entered into a conspiracy or unlawful combination in restraint of foreign trade or commerce."

The Court however further instructed the jury that notwithstanding such a violation of the statute "the right of recovery herein depends upon whether the rate charged the plaintiffs was reasonable or unreasonable, and if it was unreasonable did the defendants by their unlawful combination in restraint of trade coerce or compel the plaintiffs to pay a rate greater than

a reasonable rate, simply to effectuate the primary purpose of the combination, namely, to prevent competition in the transportation of merchandise" (p. 158).

The Court further charged the jury that if they "Conclude from the evidence that the plaintiffs have been injured in their business in consequence of the unlawful combination in restraint of trade, by the defendants requiring them to pay an excessive rate of carrying charges, you will award actual damages in the nature of compensation, and nothing in the way of punishment or exemplary damages should be allowed" (p. 160).

23. The jury before retiring asked through their foreman whether they could "have the figures that they (plaintiffs) claim—the three items" which was consented to (p. 166).

The verdict was "for the plaintiff in the sum of \$5600 with interest" (p. 167). The foreman then said "we believed they were entitled to interest but could not give the dates * * * some were not payable until a certain time afterwards, some six or nine months, and that left the jury very much in doubt when it was due."

On counsel for plaintiffs stating that interest is claimed from the date of filing the complaint, 9th of June, 1903, the record then reads, "The Court: The plaintiffs claim they are entitled to recover from such time as you deem they were damaged from the 9th of June, 1903. What do you wish to do with reference to the claim of the plaintiffs in that regard? The jury here deliberated among themselves and the foreman then stated, 'We so find,' or words to that effect" (p. 167).

Thereupon interest was allowed from that date and the Court trebled the verdict, added \$2500 as counsel fee allowed to the plaintiffs' counsel and \$70.72 for taxed costs, making in all \$25,310.90, for which amount judgment was entered.

24. The United States Circuit Court of Appeals on July 26, 1911, reversed that judgment by a short majority opinion found at page 203 of the record.

25. The plaintiffs thereafter sued out this writ of error and assigned the following errors.

First. In reversing the judgment of the Circuit Court and in directing a final judgment to be entered dismissing the complaint of plaintiffs below, and in not affirming the said judgment.

Second. In holding that the trial judge erroneously found, as a matter of law, that the combination shown by the record was in violation of the Act of July 2, 1890, generally known as the Sherman Act.

Third. In holding that the record of the trial of the case by the Circuit Court shows that an issue had then been raised by defendants below calling on to rule that it was immaterial whether the restraint imposed by the combination as charged in the complaint was reasonable.

Fourth. In holding that the trial judge erred in assuming that where it was shown that a contract combination or conspiracy as contemplated by the Sherman Act actually restrained trade or commerce, it was immaterial whether such restraint was reasonable or unreasonable.

Fifth. In holding that the trial judge erroneously held the view that it was immaterial whether the restraint imposed by the combination complained of in the plaintiffs' complaint as violating said Sherman Act was reasonable or unreasonable.

Sixth. In holding that in the light of the decisions of the Supreme Court of the United States in the Standard Oil (221 U. S. 1.), and Tobacco (221 U. S., 106), cases it was error to so construe the said statute known as the Sherman Act as to hold that it was immaterial whether the restraint of trade imposed by the

combination as complained of by the plaintiff was reasonable or unreasonable.

Seventh. In holding that upon the record and proceedings held in the Trial Court it was impossible for this Circuit Court of Appeals to hold, as a matter of law, that the acts of defendants as disclosed upon the said record amount to a combination in restraint of trade in violation of said Sherman Act.

Eighth. In holding that the combination complained of by plaintiff was not in violation of the Sherman Act.

Ninth. In holding that the restraint of trade imposed by the combination complained of by the plaintiffs was reasonable.

POINTS.

The combination was formed to suppress competition.

26. The Conference was formed some time before the 31st of December, 1898, which is the date of Exhibit A, referred to above, and was then formed by the four lines represented by the two firms of agents, Norton & Son, and Barber & Co.

"One of the objects of the Conference was to keep tramp steamers from coming or any other opposition" (p. 59).

27. Prior to the scheme made effective by that circular the four lines composing the Conference were satisfied with the agreement between themselves not to compete with each other. Competition with outside vessels was then intended to be suppressed by means of the scheme announced to the shipping trade in that circular, Exhibit A.

28. The scheme devised by the Conference was the result of increasing competition from outside sailers

and steamers, owing to increase of the number of sailers in competition, 42 during the year 1897, and owing to the appearance of competing steamers eight in number during the year 1898. (Summary of sailings, p. 180.)

29. When the trade developed to such an extent as to warrant other steamers to be berthed in competition, the Conference found it expedient to issue that circular so as to tie up the shipping trade to their Conference by the scheme manifested in that circular. It effectively kept in bondage to them the shippers to South African ports for a long and indeterminate period of time; and as effectually kept away other steamers from carrying freight to South Africa. It did this with such power, as the defendant Barber had to admit that "it was *necessary*, in order to do business, for the shippers to ship by the Conference steamers," "he *would have* to patronize the Conference steamers" (Barber, p. 80).

30. The scheme of keeping the shippers in bondage was further made effective by imposing a period of fifteen months probation of "loyalty," to run from the time of shipment, when the 10% was exacted from the shippers in addition to the net tariff rates, to the time when the money was made returnable to the shipper.

31. The exaction of "loyalty," however, was even more despotic; not only the "loyalty" of the shipper was exacted but that also of any of the consignees in South Africa to whom the shipper may have sold goods during that period of fifteen months' probation. In other words, a shipper in the United States was made to forfeit that 10% additional exacted from him at the time of shipment, not only if he was "disloyal" during that period of fifteen months, but also if one of the consignees in South Africa to whom he

may happen to have shipped goods and upon whom he had no control, may have received unbeknown to that shipper and through other shippers here, merchandise by outside carriers not controlled by the Conference (Exhibit A at foot #3, p. 14).

32. An instance of this forcible oppression is found in the letter of the Conference addressed to plaintiffs referred to *supra* 10, and is as follows at page 175:

"London, E. C., 31st Oct., 1900.

"Messrs. Thomsen & Co.,

"106 Wall Street, New York.

"Dear Sirs:

"We are favored by your letter of the 19th inst., and in reply we regret that you should feel that you have any cause for complaint, but we consider that the question of these sailing vessel shipments has not been clearly put before the Lines. When permission was asked by your good selves and other firms to ship by sailer without being *penalized* so far as rebates were concerned, we were not aware that you had received positive instructions from your principals to ship by sail, and were under the impression that you were acting on your own initiative in desiring to avail yourselves of Messrs. Crossman, sailer, otherwise we should have stated what we have now cabled to our agents, that *we shall penalize* only those marks which are shipped by sail. Of course, where commission houses go out of their way to put on sailing vessels in opposition to the Lines we shall refuse to pay them any rebate at all, and leave their *loyal clients* to claim the rebate. The fact that your rebate claim for the period ended 31st January last has been cut down from £50 to £200 through the elimination of marks of *disloyal* consignees should

we think bring home to them the *disadvantages* attending their support of outside vessels.

"Yours faithfully,
"For UNION CLAN LINE,
Campbell Corke."

When, on another occasion, the plaintiffs complained against such injustice, the 'Conference' wrote, "Your clients (meaning consignee in South Africa) admittedly shipped by sailers between the 31st of January, the closing date of your rebate claim and the date when it fell due for payment November, and therefore *forfeited* the rebate." The statement that the clients (the consignees) "*forfeited the rebate*" is impudently cynical. The Conference well knew that the forfeiture would have fallen on *the plaintiffs, the shippers*, and not on their consignee." The circular so reads; it clearly promises that the lines will pay to *shippers* the 10% additional, but provides that this is "not payable *on goods* of any consignee who directly or indirectly imports goods by vessels other than those dispatched by the Lines" (p. 14).

The Conference well knew that in the regular course of business the merchandise was sold C. I. F. to the consignee to whom it was shipped, as all shipments were made by sale based on Cost, Insurance and Freight. "It (the additional 10%) was never charged to the consignee" (p. 96). As appears from the wording of that letter, that particular shipment referred to was made during the first period of the six months of probation required by the Circular Exhibit A. During that period the consignee must not have bought and did not receive goods by outside carriers, hence there was "computed" to plaintiffs before the closing date of January 31st, as returnable to them at the expiration of the next nine months, if during this last period no breach of "loyalty" could be charged. But because between the 31st of January and the "date when it (the ad-

ditional 10% deposit) fell due for payment November" the consignee admittedly shipped by sailers through others, the plaintiffs were made to forfeit that money already "computed" notwithstanding that of the subsequent shipment made during the nine months probation, plaintiff had neither knowledge nor had he any control over the action of that particular consignee.

Moreover, it appears that the knowledge of the Conference upon which forfeiture is pronounced is derived from the mere examination of the marks seen on the goods at the port of arrival.

This is shown by their letter of apology for another forfeiture made by mistake, in which they write, "Of course, because we were unable to tell, owing to the marks being identical" (p. 175). In other words, shippers in the United States were coerced by the carriers to forfeit moneys exacted on their shipments to South Africa if consignees there bought or received goods from the United States through parties upon whom those shippers had no control. Their purpose is avowedly stated in the letter above quoted wherein they write "*the elimination of marks of disloyal consignees, should we think, bring home to them, the disadvantages attending their support of outside vessels.*" (Italics not in original.)

Competition was actually suppressed.

33. As soon as the scheme of the "Conference" went into operation in January, 1890, no steamer appeared in opposition until the Hansa steamers appeared in 1901.

Before the circular and up to 1898, there were sailers and steamers running in opposition.

Norton says, page 119:

"In 1890 there were fifty boats despatched; between me and the others. Thirty of mine and Messrs. Arkell & Douglas also had an opposition line to mine; there were twenty boats besides the thirty I despatched. That would make about 40,000 tons of cargo in 1890 * * * in 1892 I concluded that the time was ripe for the regular steam service."

Norton was on the point of chartering a steamer when the agency of one of the original of the defendant's line of steamers was offered to him, which he accepted, and the steamship service then began (p. 119).

34. That opposition of Arkell & Douglas continued after that the steamers began to be despatched by the Conference in 1893 and when by the end of 1897, against 31 steamers of the Conference, 42 sailers were dispatched in opposition by Arkell and Douglas during that year, they also concluded that the time was ripe for regular steamer service to be put up in opposition to the Conference; and during the next year of 1898 they dispatched eight steamers; and only six sailers were then dispatched.

35. The summary of sailings produced (p. 180) by defendants read together with the testimony of Norton shows concisely how the competition of the carrying trade to South Africa was suppressed from the time that the scheme of the Conference started in January, 1899, up to the time that this suit was brought, in June, 1903. It is here reproduced for further comment.

: That summary is here reproduced.

SUMMARY.

American Sailings.

Conference Steamers		Opposition Steamers	Sailing Vessels
1893	9	.....	1
1894	12	.....	17
1895	17	.....	22
1896	37	.....	39
1897	31	.....	42
1898	40	8 Arkell Douglas	6
1899	41	.....	1
1900	34	.....	5
1901	29	4 Hansa	6
1902	45	12 Prince Houston	9
1903	55	22 do.	
1904	32	16 Prince	
1905	28	5 do.	

That summary shows in unmistakable figures, produced by defendants themselves, that the competition, which was steadily growing as the trade was naturally growing and which existed prior to the inauguration of the scheme contained in the circular, Exhibit A, was completely stifled.

It shows that for the two years after that circular was put in force, no steamers and only one poor sailer was berthed in the first year of the reign of the Conference, and only five more sailed on the second year, notwithstanding that 42 sailers in one year and eight steamers and six sailers in the next year had run in opposition for the two years immediately previous to the scheme of the Conference.

36. Before the inauguration of the scheme the Conference did not reign supreme. Its members were satisfied with the agreement not to compete with each

other but when the growing competition of a good number of sailers turned into threats of competition by steamers, they schemed to reign supreme by enforcing "loyalty" for an indefinitely running period of six months into six months, and by penalizing disloyal shippers. They relied for their success on might and conquest over the seas, and not on right and commerce legitimately pursued.

37 The scheme to stifle competition was so effective that after they had become masters of the South African carrying trade for over two years, and when in 1901 there appeared the Hansa Line, a powerful German line of steamers, which had berthed four steamers in opposition during the first part of that year, they admitted that line into the Conference, and Exhibit B was issued and the identical scheme was kept up.

Again when in 1902 there appeared 12 opposition steamers belonging to the Prince Line and to the Houston Line, both of which challenged competition and the fight had continued during the beginning of the year 1903, during which period they together put up 22 of their steamers against 55 of the Conference, the Prince Line and the Houston Line were after that also admitted to the Conference (p. 108).

The competition lasted and promised to last long enough so as to warrant the risk of breaking off with the Conference and to bring suit against it.

Sulima, the plaintiffs' witness, was asked on cross-examination:

"Q. Do you know of any instance where competition of that kind lasted long enough to be of any advantage to the trade? A. The last competition lasted 16 months. Then we brought suit, and after that I think it lasted three months longer. I think it kept up a few months longer, and then they were taken into

the Conference Line—the Houston Line and Prince. That did not indicate to me as a merchant that it was not practical to keep up that competition at the rates for which it was carried on for that period. It indicates to my mind that it was so profitable that the Conference Line was willing to divide with others” (p. 108).

The scheme was coercive on shippers.

38. As soon as the scheme was inaugurated the trade had no other alternative but to ship with the steamers of the “Conference,” as no other steamers or even sailers, offered—and the Conference refused to carry goods except on the terms of the circular.

Norton:

“Q. Did you not testify at the last trial that you were instructed to refuse to ‘take less than tariff rate, plus ten per cent?’ A. Those were our instructions as I remember now. It is a long while ago. That is the natural conclusion I would arrive at. That was our practice. I think I made an exception in my last testimony, except in a very large block of cargo a person might offer 100,000 tons of stuff and they might make a special rate on it. Shippers who came to me here in the ordinary course of business and offered freight to be sent, I charged them in addition to the net tariff rate, 10 per cent. This was subject to the terms of the circular, Exhibits A and B” (p. 58).

“Unless a shipper to South Africa during that period shipped by sailing vessels, it was necessary, in order for him to do business, to ship by the Conference steamers or charter a steamer for himself; the whole cargo himself. If he had to ship anything else than an entire cargo, he would have to patronize the Conference steamers. The sizes of the vessels that we

19

loaded were from five thousand to ten thousand tons weight" (Barber, p. 80).

39. Adam Sulima, who was connected with plaintiffs' firm and in full charge of the South African department, says:

"During those two years, 1899 and 1900, there were no vessels that we could ship by except the lines of the Conference. There were no vessels. There were no steamers, and there were only a limited number of sailing vessels * * * " (p. 86).

"When it came to shipping goods we were not offered any option of paying less than the net tariff rates plus the ten per cent. We had to take that or not ship at all" (p. 87).

"I did have occasion during the times mentioned in the complaint to request to ship on other terms than the terms which the Conference offered. I made repeated requests. I always made objections to the rates they were charging and very frequently to their charges of 10 per cent additional. I have written a great many letters on the subject. Verbal communications also daily" (p. 115).

This statement was neither contradicted nor is it controverted.

40. The testimony on this point is so pervasive throughout the record, that it would greatly encumber the present brief to quote fully from the record; the above quotations suffice.

The development of the carrying trade between the port of New York and South African ports was not due to defendants' schemes as they claim, but to natural growth.

41. Defendant Norton (p. 62) says that he was the first to despatch a sailer to South Africa. That was in 1872, and "kept up the service by chartered vessels until the steamers went into the trade." That was in the spring of 1893. *"Up to this time the increase of business to South Africa was a natural growth. The tonnage was produced as the vessels were offered for transporting stuff to South Africa"* (Norton, p. 62).

So also he himself says that after that time:

*"The development of the trade over that entire period" (referring to the period between 1893 and 1903), "depended upon the state of the market in Africa * * *, the tonnage was provided according to the requirements of the trade * * *, as the needs of the trade demanded * * *, rates came to us from the principals in London (p. 63) * * *. We did not have regular sailings. We would provide a steamer to fit the requirements of the shippers."*

This most important admission virtually disposes of the case. It makes the groundwork of the complaint complete. Shippers in New York depended upon the state of the market in Africa in order to do business in that market. The South African market was and is open to the whole world and especially for grains and provisions on Argentina, East India, Brazil, Australia, New Zealand and United States (p. 108). Thus the United States shippers must make their offers in the South African market in competition with all other ports of the world. Such shippers, however, cannot so compete if one of the elements constituting one of the three basis of the trade, the *freight rate* is unreasonably high. This freight rate was at the time, fixed in London by the Conference, London owners of powerful lines of steamers, running over all oceans and seas. They did not run the risk of keeping a regular line between New York and South

African ports, but "tonnage was provided by them according to the requirements of the trade."

By the power of the combination to keep away competition they had the power to dictate freight rates, and hence the power of restraining or allowing merchants in the United States to trade with South African markets. Far from developing the export trade they controlled it, and owing to their powerful combination the control was such that freight rates were fixed in London in accordance with the position of their respective steamers wherever they may happen to be lying in the various ports of the world.

Plaintiffs and Defendants do not stand on equal footing.

42. The United States Supreme Court, however, has long ago decided that shippers could not be subjected by carriers to unreasonable conditions of trade, because they do not stand on equal footing with the carrier.

In *Lockwood vs. N. Y. Central R. R. Co.*, 17 Wallace, 357 (1873), the Supreme Court has firmly established that carriers and their customers do not stand on a footing of equality. It was there pointed out, how necessary it is to stand firmly by those principles of law by which the public interests are protected against common carriers.

The principle involved in that case is also the one involved in this. There a condition claimed to have been stipulated by the shipper because embodied in the Bill of Lading was held to be unreasonable and therefore unlawful; in the present case the jury has found the rates imposed by the Conference to be unreasonable and hence for parity of reason their exaction was unlawful.

That case has ever since been the ruling standard on that principle; and carriers and their special counsel have avowedly had it constantly before them, whether for the purpose of following closely its rulings or of trying to circumvent them if possible.

43. The Supreme Court's rulings apply generally to all unreasonable conditions invoked or imposed by common carriers.

The Court said:

"The carrier and his customer *do not stand on a footing of equality*. The latter is only one individual of a million. He cannot afford to biggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading or sign any paper the carrier presents, often, indeed without knowing what the one or the other contains. In most cases, he has no alternative but to do this or abandon his business.

* * * * *

"If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one charging him with the duty of accommodating the public in the line of his employment, then if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair and no concern of the public. But the condition of things is entirely different and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it and impose such conditions upon travel and transportation as they see fit which the public is compelled to accept."

Lockwood vs. N. Y. Central, 17 Wall., 357 (1873).

How much more forcibly are these considerations to be applied to the present case when the South African carrying business was not mostly but exclusively "concentrated in a few powerful corporations" whose express purpose in the combination "enabled" them to control that carrying business and to impose unreasonable freight rates "as they see fit," which the shipping trade was compelled to accept.

The wisdom of those ruling in the Lockwood case is even more appreciated now, when even without the existence of a "Conference" the carrying trade has actually assumed gigantic powers. How much more formidable is, today, the facility to exercise duress by carriers whose "business" now more than then, "is mostly concentrated in a few powerful corporations—whose position in the body politic enables them to control it?" How much more easy it is for carriers today "to impose such conditions upon travel and transportation," whether by land or sea, "as they see fit, which the public is compelled to accept." It is because of such superiority of the carrier over his customers that the Sherman Act, the Elkins Act, the Harter Act and other kindred legislation has become necessary so as to declare and enforce by statute the limitations, restrictions, liabilities and relations between carriers and their customers hitherto diffusely expressed in precedents forming the common law as reported in the multitude of books of judge made law.

44. In *Menacho vs. Ward*, 27 Fed. Rep., 259 (1886), Wallace, J., in a case similar to the present one, stated the case in the following language:

"Prior to 1881 the two defendant steamship lines were competitors between New York and Cuba, but subsequent thereto they operated under a traffic agreement, by which uniform rates were charged.

"The two defendant lines were the only two regular lines between New York and Cuba. There are other vessels which casually ply between the two places.

"The complaint is that defendants announced to New York merchants that they must not patronize steamships which offer for a single voyage; and that on various occasions when other steamships have attempted to procure cargoes, defendants notified shippers that those employing such steamships would thereafter have to pay higher rates. The defense is that it was found necessary by defendants for the purpose of securing sufficient patronage, to make differences in rates in favor of those who would agree to patronize defendants exclusively."

After going with great length into discussion of the rights and duties of common carriers, His Honor concluded in the very impressive language following, viz:

"The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated, it will result practically in giving the defendants a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between these places. Such discrimination is not only unreasonable, but is odious."

The doctrine *volente non fit injuria* does not apply when parties are not on equal terms.

45. The defendants' claim that the additional 10% paid at the time of shipment cannot be recovered because it was voluntarily paid. Duress existed when the effect of the combination was such that unless a trader complied with the exaction he could not continue his business. It is sufficient if duress is the result of an abuse of the situation whereby the one receiving the exacted payment places the party paying in a position "that unless it complied with the exaction it should not continue its business."

It was so held in *Swift Company vs. The United States*, 111 U. S., 22, upon facts showing exaction of payments made without protest during the course of eight years—under an unlawful rule adopted by a collector of Internal Revenue.

The Court said:

"This was in effect, to say to the appellant that unless it complied with the exaction, it should not continue its business; for it could not continue its business without stamps except upon the terms prescribed by the commissioner of internal revenue. The question is, whether the receipts, agreements, accounts and settlements made in pursuance of that demand and necessity, were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right" * * *.

"The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. Money paid or other value parted with, under such pressure has never been regarded as a voluntary act within the meaning of the maxim, *volente non fit injuria*."

Tender, Protest and Actual refusal of defendants were unnecessary.

46. If shippers in the export trade especially could have no redress against unreasonable exactions from

the carriers unless a tender is made of their goods although anticipating a refusal, the export trade would be ruinous. Shippers would have either to abstain from doing business intended as they could not well afford to purchase the goods knowing that they would be unable to forward them at the unreasonable rates demanded by the carrier or they would have to resort to the courts for a jury trial so as to establish the right to ship them at reasonable rates.

This is what the Supreme Court held in *Lockwood vs. Railroad Co.*, *supra*, when carriers make it a rule to refuse to carry goods except on their own terms. This Court has held so even in the case of *Swift Co. vs. United States* *supra*, when an erroneous government rule of eight years' standing compelled purchasers of government stamps to buy them at the terms imposed by that rule.

"A rule of that character, deliberately adopted and made known and continuously acted upon, dispenses with the necessity of proving in each instance of conformity that the compliance was coerced."

Swift Co. vs. U. S., 111 U. S. 22 (1884).

So also *Gree J.*, said:

"I do not consider it necessary that the refusal should be express. It is sufficient—if the person has just and reasonable ground to apprehend that unless the money is paid his goods will not be carried or will be withheld. When a corporation or person has the power to refuse a right to which a party is entitled, unless he complies with an unjust demand, they do not stand upon an equal footing. The Courts will not be illiberal in allowing a person to act upon his reasonable apprehension of such refusal when the circumstances fairly show that unless he does submit to the illegal demand his right will be withheld."

W. Va. Transportation Co. vs. Sweetzer, 25 W. Va., 434 (1885).

Unreasonable or coercive rates of freight are recoverable.

47. In Texas & P. R. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426; S. C., 27 Supreme Court Rep., 353, the Court said:

"Without going into detail it may not be doubted that, at common law * * * it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted, either in advance or at the completion of the service, an action may be maintained to recover the overcharge. 2 Kent, Com. 599, and note a; Smith Lead Cas. pt. 1, 8th ed., (Hare and W. notes), 457."

In *Herserman et. al. vs. The Burlington Cedar Rapids & Northern Railway Co.*, 63 Iowa, 732 (1882). The action was at law to recover certain sums paid by plaintiff to defendant for transportation of grain upon defendant's railroad in excess of reasonable and just charges therefor.

The main defense set up by the defendant was that the plaintiff knowingly, voluntarily and willingly paid the charges.

The Court, per Beck. J., said:

"The plaintiffs seek to recover the sum paid by them in excess of reasonable charges and nothing more. The liability of defendant for money collected for the transportation of property, in excess of reasonable charges, existed at common law. The enactment of a statute imposing penalties for excessive charges recoverable by the party injured, or providing that for exacting and collecting them the agent of the railroad company shall be guilty of a

misdemeanor, does not take away the right existing at common law to recover money paid in excess of reasonable charges. See: *City of Dubuque vs. Ill. Cen. Ry. Co.*, 39 Iowa, 56; *City of Burlington vs. B. & M. Ry. Co.*, 41 *id.*, 134; *Crittenden vs. Wilson*, 5 Cow., 165; *Gooch vs. Stephenson*, 13 Me., 371; *Candee vs. Howard*, 37 N. Y., 653."

This decision elaborates so fully the point under examination that it is hoped that it may not be charged as supererogation to appropriate the argument as part of this brief. That Court went on to say:

"The injured party may waive the tort created by statute and sue upon the implied contract raised by the law, whereby the carrier is obliged to repay the consignee or consignor of the property all sums exacted in excess of reasonable compensation. Nor need the plaintiff, in a case brought to enforce such an obligation, show objection or protest prior to the payment made in excess of a reasonable compensation. These rules are founded upon the consideration that railroad companies are public carriers, and those who employ them are in their power, and must bow to the rod of authority which they hold over consignors and consignees of property transported by them. If the consignor refuses to pay or contract to pay the charges fixed by the railroad company, his goods will not be carried; or, if the consignee refuses to make the payment demanded, the goods will not be delivered. In both cases great loss and even destruction of profitable business will result. If railroad companies should be held free from liability for excessive charges, the whole business of the country would be subject to unjust exactions, resulting in oppression to citizens and destruction to useful and profitable business. The law does not require objection or protest to the payment of unjust charges, for the reason that they would be vain, being addressed to those who occupy

the commanding position of power to enforce obedience to their requirements. For another reason they are not required; those who do business with railroads never come in contact with the officers who possess authority to fix or abate rates of charges; indeed, they usually hardly know their names or where to find them. Their places of business are usually in cities, distant from points where much of the property is received for transportation. If the consignee should be required to make objection or protest to these officers, delays would follow, resulting in loss and, in the case of the shipment of some kinds of perishable property, in its decay. These considerations take the case from the operation of the familiar rule which forbids recovery on account of payments voluntarily made without objection or protest. This rule does not apply to cases of compulsory payments, and does not require objection and protest when they would be unavailing and vain. The doctrines we have expressed are supported by the following authorities: *Chicago & Alton Ry. Co. vs. Coal Co.*, 79 Ill., 121; *Mobile & M. Ry. Co. vs. Steiner et al.*, 61 Ala., 559; *Parker vs. Great Western Ry. Co.*, 7 Man. & Cr., 253; *Harmony vs. Bingham*, 12 N. Y., 99; *Chandler vs. Sanger et al.*, 114 Mass., 364; *Stephen vs. Daniels et al.*, 27 Ohio, 527; *Robinson vs. Ezzell*, 72 N. C., 231; *Carew vs. Rutherford et al.*, 106 Mass., 1; *Lafayette & I. Ry. Co. vs. Pattison*, 41 Ind., 312; *Philanthropic Building Assn. vs. McKnight*, 35 Pa. St., 470; *Wood vs. Lake*, 13 Wis., 84; *Wheaton vs. Hibbard*, 20 Johns., 290; *Thomas vs. Shoemaker*, 6 Watts & S., 179; *Palmer vs. Lord*, 6 Johns. Ch., 95; *State Bank vs. Ensminger*, 7 Blackf., 105."

These abundant quotations show how pervasive is this doctrine in the several states of the Union.

48. This doctrine as applied to shippers and carriers is also an old doctrine of the English Courts. In

Parker vs. The Great Western Railroad Co., 7 M. & G., 253 (1844), Tindal, C. J., said:

"But it remains to be considered whether the money so paid can be recovered by the plaintiff, in this action.

"It was argued for the defendants that it cannot; for, that the payments were made voluntarily, with a full knowledge of all the circumstances; and that the plaintiff was not compelled to make those payments, but in each case, must be considered as having made a contract with the company to pay them a certain sum of money as the consideration for the carriage of his goods; and that having made such contracts, he cannot now retract, and recover the money paid in pursuance of them. In support of this argument Knibbs vs. Hall (a), Brown vs. McKenally (b), Bibbie vs. Lumley (c), and Brisbane vs. Dacres (d) were cited. On the other side, it was urged, that these could not be considered as voluntary payments; that the parties were not on equal footing; that the defendants would not, until such payments were made, perform that service for the plaintiff which he was entitled by law to receive from them without making such payments; and that consequently he was acting under coercion, and in support of this view of the case, Drew vs. Parson (e), Morgan vs. Palmer (g), and Waterhouse vs. Keen (h) were referred to."

"We are of the opinion that the payments were not voluntary. They were made in order to induce the company to do that which they were bound to do without them; and for the refusal to do which an action on the case might have been maintained. Parker vs. G. W. R. R'way Co., 7 Mass., 253, and followed in Beckwith & Frisbie, 32 Pt., 559-566."

In transactions prohibited by law for the protection of one set of men from another set of men, the parties are not in pari delicto.

49. This is an aphorism attributed to Lord Mansfield but well applies to the Sherman Act which is intended for the protection of that set of men from that other set of men who by combinations render unable the former set to benefit by the usual advantages offered by competition.

In *Duval vs. Wellman*, 124 N. Y., 156 (1891), the New York Court of Appeals, Brown, J., said:

"It will appear from an examination of the authorities upon this subject, a very few only of which are cited, that courts, both of law and equity, have held that two parties may concur in an illegal act without being deemed in all respects '*in pari delicto*.'"

50. The above rule is the more applicable when such agreements are entered into under circumstances of imposition, hardship or undue influence and especially where there is a necessity of supporting public interests such as are intended to be by the Sherman Act. To decide that money of the plaintiffs could not be recovered, would be to establish the rules by which the defendants and others of the same ilk could ply their trade and secure to themselves the fruits of their unlawful transactions.

All parties to the unlawful combination are liable in solido.

51. In the *City of Atlanta vs. Chattanooga Foundry*, 127 F. R., 23 (1903), the Court said:

"If the agreement between the defendants and their associates was unlawful and tortious, each is responsible for the torts committed in the course of the illegal combination. These defendants have themselves participated in the benefits resulting from the bonus paid by the Alabama member of the association, and have no ground to complain that they have been alone sued. (Stockwell vs. U. S., 13 Wall., 531, 20 L. Ed., 491; Van Horn vs. Van Horn, 52 N. J. Law, 286, 20 Atl., 485, 10 L. R. A., 184; Robertson vs. Parks, 76 Md., 118, 135, 24 Atl., 411.)"

So, also Wallace, C. J., in *Interstate Commerce Commission vs. Texas & Pacific R. R.* 52 F. R., 187:

"If the order made by the commission was a lawful one I see no reason why the defendant should not be compelled to obey it, notwithstanding the Southern Pacific Company is not at present pursued. If the defendant is violating a proper order of the commission, it should be restrained from doing so; and it cannot escape upon the objection that another wrong-doer is also violating it."

In *Loder vs. Jayne*, 142 F. R., 1015 (1906), although judgment was reversed on other grounds the reasoning in the opinion below was affirmed as to the following:

"The evidence shows that these three defendants were fully aware of the methods pursued by the association to which they belonged, by which their members strengthened and perfected the system of coercion emanating from Chicago, and that they, to a more or less extent, participated and acquiesced in the preliminary arrangements leading up to the consummation of the plan. The Philadelphia Association of Retail Druggists, of which Mr. Poley is a member, is a corporation, and is made a defendant in this case, yet whatever part he took as an individual in the preliminary

and final steps taken to carry into effect the combination and conspiracy as charged, he must answer for in his individual capacity."

Agents of principals are equally responsible in solido with all parties to the illegal combination.

52. The unlawful combination having been hatched in England and the unreasonable rates of freight fixed in London, the "Conference" could not have been in a position to injure with impunity or otherwise conveniently, the trade of shippers from the U. S. to South Africa had it not done so, by the employment of agents. These agents accepted the agency and acted as such at their own risk and peril, and for their own profit.

When, in "an unlawful plot to advance the price of lard" the defendants claimed exemption from responsibility because they acted as mere agents for the principals in that plot, the New York Court of Appeals after holding that the scheme was an indictable misdemeanor under §168 of the Penal Code, held the defendants responsible saying:

"When persons knowingly promote and participate in carrying out a criminal scheme they are all principals and the fact that one of the parties acts, in some respects, in subordination to the others and is to profit less than the others, or not at all, by the consummation of the scheme, does not render such person less a principal. This rule is elementary and does not require elaboration or the citation of authorities" (Leonard v. Pool, 114 N. Y., 371).

The Court committed no error in charging as matter of law that the combination was illegal.

53. The proofs regarding the combination and its purpose to suppress competition were not contradicted, nor is the evidence conflicting. This consisted of the testimony given by two of the defendants and of the circulars. That there was a Conference is admitted, that the object of the Conference was to support competition is also admitted. That they effectively suppressed competition by taking in the "Hansa Line" when it appeared in a powerful competition, and that they later took in the "Prince Line" and the "Houston Line" when they also appeared in powerful competition is also not controverted. The only consequential question raised, which could be raised upon that evidence was one of law, as to whether or not it was a lawful combination. The Court could not but charge the jury that it was an unlawful combination such as the Sherman Act condemns. The Court charged:

"As regards the asserted combination, the *only testimony is not conflicting* and considering it together with the printed circulars, Exhibits A and B in evidence, *and I think an unlawful combination such as the Sherman Act condemns—is fairly proven by the plaintiffs.* Hence I instruct you as a matter of law, that the defendants in violation of the anti-trust statute entered into a conspiracy or unlawful combination in restraint of foreign trade and commerce," p. 158.

Indeed the combination was such, as is condemned at common law, that relating to carries especially. That no written agreements between the members of the Conference was proved is no reason why those admissions should go for naught. It seems to be a play of words for defendants to assert that because there was no agreement in writing proved the question was for the jury whether "the allegations of the complaint were supported by the proofs and tended to establish a combination in restraint of the

carrying trade from New York to South African ports."

The jury found the 10 per cent an unreasonable and coercive rate of freight.

54. The Circuit Court below submitted to the jury the question whether the 10% collected from plaintiffs at the time of shipment was or was not, an unreasonable and coercive charge.

It would have been sufficient if the Court below had only submitted to the jury the question whether the ten per cent charge was coercive and intended to prevent the plaintiffs from patronizing other lines when an opportunity so to do might have arisen. But the Court charged:

"If, however, the rate was excessive and the 10 per cent charged was to prevent the plaintiff from patronizing other lines, *and* if you believe that the rate was unreasonable and unreasonably exacted, then, in that event, plaintiffs are entitled to recover, first, the amount paid by plaintiff for primage; that is to say they are entitled to recover this 10 per cent paid in addition to such rates, as the defendants, the common carriers exacted; they are entitled to recover the amount of money which the defendants would have paid to the plaintiffs had they remained loyal shippers, and as I remember the testimony, that is substantially shown and not disputed, that such amount paid by plaintiffs to the defendants on account of the primage amounted to \$5,600. And as I stated if in your judgment such rate is excessive and unreasonable, the plaintiffs should be entitled to recover the amount stated" pp. 160-161.

It is evident that the verdict of the jury was predicated upon the \$5,600 item "substantially shown and

not disputed" to represent the 10% additional moneys—which they had been paying as primage and as distinguished from the two other items one for \$2,950 and the other for \$6,700 which plaintiff also claimed as damages sustained by reason of that illegal combination, but which the jury did not grant.

It is idle to discuss in this case as suggested by defendants below whether the Sherman Act "prohibits every contract or combination in restraint of competition," for the very good reason that the Conference or combination complained of in this case, has actually suppressed competition; has actually restrained traders from shipping freely their goods to South Africa and has in no way benefited, increased or developed this trade.

In the language of the *Addyston Pipe and Steel Co. vs. United States*, 175 U. S., 211 (1899): "The facts thus set forth show conclusively that the effect of the combination was to enhance prices beyond a sum which was reasonable" and that the Conference did so enhance them to an unreasonable rate—the jury so found.

55. The point of defendants below claiming that the Court erred in failing to direct a verdict for the defendants on the ground "that there was no proof of any legal injury to the plaintiff" is untenable. The defendants based their claim on the ground that "plaintiffs offered no evidence that the rates charged were unreasonable."

The proof that the defendants in Conference made a charge of ten per cent on the net amount of freight; and that they offered back that same amount to those shippers who were "loyal" to the Conference; and the proof that they charged and exacted that 10% more as an integral part of the freight; and that they would have been satisfied with the net freight charges had the defendants succeeded to attain the loyalty of all

shippers and consignees, was evidence sufficient for the jury to find, that the 10% additionally charged was an unreasonable charge as a freight rate, and that it was unreasonably exacted in excess of the amount of freight which they were satisfied ultimately to get; and the jury so found.

Non-competitive rates suggest unreasonable rates.

56. It is an elementary principle in the laws of trade that a noncompetitive price or rate deprives it of its value as a standard of a reasonable price or rate and the presumption is that it is an unreasonable price or rate especially when the lack of competition is procured by the party fixing that noncompetitive price or rate.

That the rates fixed by the Conference were non-competitive was just what the Conference was created for. The Interstate Commerce Commission, in a case where the issue was whether or not the rate of freight was excessive, said:

"If we find that it (the rate of freight) was not the product of competition, but was the result of an agreement, this fact would rob the rate of the presumption of reasonableness which might otherwise attach, and should be considered by the Commission in determining whether the advance was justifiable."

China and Japan Trading Company vs. Ga. R. R. etc., 12 I. C. C., 241.

So also Taft, J., said as is quoted with approval by the Supreme Court in the Addystone Pipe and Steel Co.:

"It has been earnestly pressed upon us that the prices at which the cast iron pipe was sold

were reasonable * * *. We do not think the issue an important one, because as already stated we do not think that at common law there is any question of reasonableness open to the Court with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices had they chosen to do so. The contract and power then referred to had already been passed upon to be such as to enable the defendants by their combination to deprive the public of the advantage and thus enable them to compel the public to pay an increase over what the price would have been if fixed by competition between defendants. * * *. The defendants acquired this power by voluntarily agreeing to sell only at prices fixed by their committee" (p. 237 of the U. S. reports *supra*).

The N. Y. Court of Appeals also held the same principle of the common law.

57. The defendants claim that they had a right to discriminate by giving back to loyal shippers that 10% if that was a reasonable charge as freight, and they quoted below what Wallace, J., said in *Menacho vs. Ward, supra*:

"It is his (the carrier's) privilege to charge less than a fair compensation to one or a class of persons, and others cannot justly complain."

But his Honor also said and decided in that case that the announcement that shippers "must not patronize steamers" other than those of that combination and that if they did, they "would therefore have to pay higher rates" was a discrimination which was "not only unreasonable but odious" and that "the vice of the *discrimination* is that it is *calculated to coerce* all those who have occasion to employ common carriers * * * from employing such agencies as may offer." (The italics not in the original.)

The Conference is an unlawful combination in restraint of trade within the meaning of the anti-trust Act.

58. The facts admitted, the undisputed facts and the facts found by the jury throw full light most reasonably leading to the conclusion that the defendants have entered into an unlawful combination in restraint of trade.

The decisions of this Supreme Court in the cases *Standard Oil v. U. S.* 221 U. S., 1 and *U. S. v. American Tobacco Co.* 221 U. S., 106, have set at rest all disputes in regard to the construction and the application of the Anti-trust Act.

This Supreme Court has announced no new judge-made law, and has disturbed no precedent announced by decisions rendered on the Anti-trust Act previous to those decisions.

"Those cases may be taken to have established that only such contracts and combinations are within the Act as by reason of intent, or the inherent nature of the contemplated acts prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade, 221 U. S., 179."

Nash v. United States, 229 U. S., 373.

59. By those decisions it is now to be understood that however "a contrary view" may have been "sometimes erroneously attributed to some of the expressions" found in the prior decisions of the Supreme Court,, those expressions now "are necessarily limited and qualified," but what was "*held* by the Court has *not* been limited or qualified."

The Supreme Court has summed up the decisive points contained in them in the following language found in the *Standard Oil* decision:

"In the cases relied upon, having been found that the *acts complained of* were within the statute, and operated to produce the injuries which the statute forbade, *resort to reason was not* permissible in order to allow that to be done which the statute prohibited. This being true the rulings in the cases relied upon when rightly appreciated were, therefore, *this and nothing more*. That, as considering the *contracts or agreements*, their necessary effect and the character of the parties by whom they were made, *they were clearly* restraints of trade within the purview of the statute, they could not be taken out of that category *by indulging in general reasoning as to the expediency or non-expediency of having made the contracts, or the wisdom or want of wisdom of the statute which prohibited them being made.*" (The italics are not in the original.)

In other words the Supreme Court has applied the rule of reason to the construction of the Anti-trust Act exactly in the same manner as is done in the construction of all other statutes and in demonstration of this the Court says:

"Take for instance the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition depending upon wrongful intent. *Take questions of fraud.*"

The Court clearly means that as a matter of duty from the beginning, resort to the light of reason is necessary in order to determine whether the acts complained of are or not in restraint of trade in the same manner as it does in order to determine whether acts complained of amount to a fraud or not.

As to the Court's duty to resort to the light of reason the Court very sharply says, "This is so clear as to require no elaboration."

60. In neither of the two decisions has the Supreme Court entered into an examination of the question

whether, by reason of the facts complained of, the restraint of trade effected thereby was or not reasonable.

In both cases, and especially in the Standard Oil case, a most elaborate defense was submitted in order to show that the trade was benefited and had not suffered by the acts complained of, but the Court did not entertain that defense. The Court's reasonings in both cases are directed to the solution of the question whether those acts so complained of were reasonably to be held in restraint of trade, that is to say whether they were within the condemnatory reasonable meaning of the statute "considering the contracts or agreements, their necessary effect, and the character of the parties by whom they were made."

This is pointedly shown in the Tobacco decision where the Court in amplification of the Standard Oil decision says that in that decision:

"It was held *not* that *acts* which statute prohibited *could be removed from the control of its prohibitions by a finding that they were reasonable*, but that the duty to interpret, which inevitably arose from the general character of the term *restraint of trade*, required that the words restraint of trade *should be given a meaning which would not destroy* the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect." (The italics are not in the original.)

The sum total of these two decisions is to be found epitomized in the words used in the Tobacco case:

"The soundness of the rule that the statute should receive a reasonable construction after further mature deliberation, we see no reason to doubt."

61. But a "reasonable construction" of the statute is far different from an examination into the reasonableness of the restraint.

The examination into the reasonableness of the cause causing the restraint is what calls for a reasonable construction of the statute.

Once that by a reasonable construction of the statute, the acts complained are found to cause actually or potentially a restraint of trade within the meaning of the prohibition a further inquiry as to the reasonableness or not of its effect is of necessity immaterial.

What is a reasonable construction of the statute applicable to a given state of facts, may be a matter of honest dispute between one set of legal minds and another. In the great intellectual progress of modern times, calling for the creation of modern practical utilities in conformity to the requirements of public policy running with the times, honest legal advisers at the bar guided by their light of reason may consider lawful what a prevailing legal opinion coming from the bench may hold to be unlawful.

"But apart from the common law as to restraint of trade the law is full of instances where a man's fate depends on his estimating rightly."

Nash v. United States, 229 U. S., 373, *supra*.

62. What is a restraint of trade is a relative not an absolute conception, and the rule as to its application by the light of reason to examine into the acts complained of is necessarily relative and not absolute. That rule is of great deal harder application when the enquiry relates to such a difficult question of public policy as to what amounts to a restraint of trade held unlawful within the meaning of the Anti-trust Act, than when inquiry relates to questions involving ordinary acts complained of as amounting to fraud, burglary and the like.

It is now made clear that such a rule cannot possibly be absolute, in its application to acts complained of, so as to strike indiscriminately at any species of acts which by a rigid and inflexible construction of the statute would come under its consideration, but which by the light of reason would be adjudged not to come within the spirit and meaning of the statute.

What is now settled law is the antithesis provoked by the hypothesis contained in Judge Lacombe's opinion in the Tobacco case, 164 F. R., 700, relating to the supposed combination of those two rival express carriers there mentioned. In their brief before the same Circuit Court of Appeals, defendants-in-error herein plaintiffs-in-error then asked "If instead of each running his ramshackle wagon with his worn out horse they combine their capital and energy and by so doing give better facilities at reasonable rates, will trade or commerce as matter of fact be thus restrained; will it not, rather be promoted? However paradoxical the hypothesis might have been intended to be by Judge Lacombe, counsel for defendants have interpolated the supposition of the combination giving "facilities at reasonable rates" which is just contrary to what the jury has found as a fact in this case.

Tendency to control or cheapen is the test.

63. Resort to reason necessarily must be had when on facts submitted it is to be determined whether they come or not within a reasonable construction of the statute. Whether for example free competition, assumed rightly or wrongly to be the very life of trade, may not in some instances yield to any other equally life giving element in trade, such as the aggregation of large capital for the public interest. Economic considerations of proper nursing of accumulation of capital is as much a matter of public interest in this

industrial age requiring cosmopolitan dealings, as is the proper nursing of competitive relations between industries bidding the worldwide over.

64. The combination complained of, however, is in no sense an "aggregation of capital" necessary for the development of trade; nor is it a unification of interests to cheapen freight rates or general expenses, but it is avowedly a combination among four powerful steamship owners under one foreign flag and another as powerful steamship owner under another foreign flag to suppress competition among themselves and to keep away from competition any tramp or other vessels in the carrying trade between this port of New York and South African ports; and such a combination as complained of derives its vitality from a scheme devised by the combination whereby it keeps traders between those ports subservient to the power of that combination; all of which is fully submitted hereinbefore.

The Conference is an unlawful combination to the prejudice of the public interest in the United States.

65. "Public interest" is the feeder of the light of reason leading to the determination as to whether "contracts and combinations are within the Act as by reason of intent or the inherent nature of the contemplated Acts prejudice the public interest."

Such is the rule laid down in *Nash v. United States*, *supra*. The defendant's contention is that the intent to suppress competition is not condemned by the Act. They argue that because "restraint of competition" was intended to be forbidden by the bill as it was originally proposed, and because as redrawn by the judiciary committee and as it became a law the bill was directed against combinations in restraint of trade, the Act did not mean to declare against combinations tending to

suppress competition. The mere comparison of the bills in the two forms and the debates held in Congress is far from leading to the support of the defendant's counsel's contention, it shows unmistakably that Congress intended to strike at the general causes of restraint of trade, and not at the specific evil caused by restraint of competition. Congress held restraint of trade generally to be the *genus* of the causes of the evil to be prohibited and restraint of competition as a *species* of it, that is one of the causes causing restraint of trade.

The British Mogul S. S. Co. case is of no decisive force applicable to the facts in this case.

66. The British case of *Mogul S. S. Co. v. McGregor*, has been urged with great vigor by defendants in support of their contention that suppression of competition such as is devised by the scheme of the Conference is not condemned by the Act, and with greater vigor still since this Court made special reference to that British decision in the *Standard Oil* case.

That British case has no decisive force of reasoning on the facts presented in the case at bar.

a. because the British public policy disclosed in that case tends to differ from the public policy of that declared in the *Anti-trust Act*.

b. because the scheme of the Conference in that case differs radically from the one in this case.

c. because the action brought in that case differs in its inherent nature from the one in this case.

67. The English *Mogul* case is not quoted by the Supreme Court with approval as to the merits of the case. It has only been referred to in that part of the *Standard Oil* decision where the Supreme Court was

considering "the development of more accurate economic conceptions and the changes in conditions of society," and when considering what by reason of such development "became the rule in the English law." While the Supreme Court has abstained from animadverting upon the merits of that English decision, it has, however carefully avoided to pass upon its effect in relation to our laws and to our courts.

The Supreme Court has very significantly remarked that, coming after the passage of the *Anti-trust Act*, that decision serves reflexly to show the exact state of the law in *England* at the time the Anti-trust statute was enacted." The Supreme Court has compared the time of the passage of the Act with the time when the English decision was ultimately rendered in the House of Lords. That comparison in time is important and it is also important to note that the anti-trust act was in fact enacted between the time when the Mogul case was decided by the British appellate court and the time when its decision was affirmed by the House of Lords. That is, it was April when that appellate tribunal rendered its decision and it was December following when Senator Sherman first introduced the anti-trust bill.

Mogul S. S. Line v. McGregor Gow. H., 31 L. R., 554 (1888).

Affirmed on Appeal, 23 L. R., 598 (1889).

Affirmed again in the House of Lords, 17 App. Cases, 25 (1891).

Lord Coleridge's decision rendered in the first instance was affirmed by the Appellate Judges on grounds different from his opinion that the acts of defendants were not in restraint of trade. Bower, L. J., concurred on the ground that "contracts in restraint of trade are not illegal in any sense except that the law will not enforce them. * * * The law considers the disadvantage so imposed a sufficient shelter to the public." Fry, L. J., premised his dis-

cussion by saying, "if in restraint of trade it is *prima facie* void only and not illegal, no statute in force makes such competition criminal," and then went on to say, "the public policy of our law as at present declared by the legislature is against all fetters on combinations and competition unaccompanied by violence, or fraud or other like injurious acts." Lord C. J. Eshe, however, dissented from the majority opinion and said "the agreement in accordance with the cited cases *must be held to be in restraint of trade.*"

It is remarkable that in the December following this majority opinion, our legislature proposed and did ultimately enact that all unlawful combinations in restraint of trade are indictable, are actionable by the injured party and are restrainable by government prosecution.

Thus it is that our Anti-trust Law by a declaratory and remedial enactment of Federal legislation has settled what is and has been the Common Law of the United States, and what is the public policy of the Federal Government on the subject in its exercise of the power to regulate commerce between the states and foreign nations.

In proposing the bill to the Senate, Senator Sherman said:

"The Act does not announce a new principle of law but applies old and well recognized principles of the common law to the complicated jurisdiction of our State of Federal Government. Similar contracts in many states of the Union, are now by Common Law or Statute Law, null and void."

68. Senator Sherman, without referring directly to this Mogul S. S. decision, but seeing its fallacy or its inappropriateness to our public policy and perhaps being alarmed at the injurious effects of a British policy tending to secure the monopoly of the world's carrying trade by sea, proposed that law known by his name in order to settle clearly the interests of the trade

and commerce of the United States in accordance with its recognized public policy, and thus mark, by legislative declaration, a dissent from an eventually different British policy.

It is remarkable still that in affirming that majority decision the House of Lords, after our Statute had become a law, was also divided in opinion as to whether the acts of defendants were or not in restraint of trade, and if so whether they are indictable or actionable under British law, but approved the statement of Fry, L. J., the British public policy "as at present declared by the legislature is against all fetters on combinations and competition unaccompanied by violence or fraud or other like injurious acts."

69. What has been the public policy of England before its legislature had declared in favor of abolishing all fetters on "combination and competition" is shown by the necessity of resorting to more legislation for the purpose of having the public policy of the realm changed.

The public policy previously existing in England is that which has come down to us at the time of our separation from the mother country and is such as already has been shown to exist in England prior to that legislature referred to by the appellate court in the *Mogul S. S. cases*.

It has continued to be our public policy since.

70. In the State of New York where the cause of action arose that public policy is well established.

In 1845, when a combination of large forwarding lines on the Erie and Oswego canals entered into a combination "for the purpose of establishing and maintaining fair and reasonable rates of freight and equalizing the business among themselves and to avoid all unnecessary expenses in doing the same," the New York Court of Appeals, said:

"The Revised Statutes provide that 'if two or more persons' shall conspire to commit any

act injurious to trade or commerce they shall be deemed guilty of a misdemeanor; 2 R. S., 691, Sec. 8."

* * * * *

"The object of this combination was obviously to destroy competition between the several lines in the business engaged in. It was a conspiracy between the individuals contracting, to prevent a free competition among themselves in the business of transporting merchandise, property and passengers upon the public canals. * * * It is a familiar maxim that competition is the life of trade. It follows that whatever destroys, or even relaxes, competition in trade, is injurious, if not fatal to it."

Hooker v. Van DeWater, 4 Denio, 349.

And in the next year 1846, when a similar combination came again before that Court of Appeals, the Court said:

"The articles of association, in our judgment unquestionably contravene public policy, and are manifestly injurious to the interest of the state. Hence they are void at the common law."

Stanton v. Allen 5 Denio., 434.

Again in 1870, Folger, J., said:

"The true inquiry is, is it the natural tendency of such an agreement to injuriously influence the public interests? The rule is that agreements, which in their *necessary operation* upon the action of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public, or of third parties, are against the principles of sound public policy, and are void."

Atchison v. Mallon, 43 N. Y., 147.

It is for this reason, and not on account of the actual results upon the public or upon third persons, of particular contracts, that they are held void. It is because men with these agreements in their hands, and

relying upon them for their gain, do not act toward the public and third persons *as they would without them, under the stimulus of competing opposition.*

Again in 1876-1877 the same court held that a combination to effect such a purpose "is *inimical to the interests of the public*, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal is too well settled by adjudicated cases to be questioned at this day. (Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. R., 173; People v. Fisher, 14 Wend., 9; 4 Denio, 352; 5 *id.*, 434; 44 N. Y., 87, and cases cited)."

"Every producer or vender of coal or other commodity has the right to use all legitimate efforts to obtain the best price for the articles in which he deals. But when he endeavors to artificially enhance prices by suppressing or keeping out of market the products of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such arrangements are even more mischievous than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy and illegal."

Arnold v. Pittston v. Elmira Coal Co., 68 N. Y., 558.

Again in October, 1893, Andrews, C. J.:

"But the question here does not, we think, turn on the point whether the agreement between the retail dealers in coal did, as matter of fact, result in injury to the public or to the community in Lockport. The question is, was the agreement, in view of what might have been done under it and the fact that it was an agreement the effect of which was to prevent competition among the coal dealers, one upon which the law affixes the brand of condemnation. It has hitherto been an accepted maxim in political economy that "*competition is the life of trade.*" The Courts have acted upon and

adopted this maxim in passing upon the validity of agreements, *the design* of which was to *prevent competition* in trade, and have held such agreements to be *invalid* * * *. The cases of Hooker v. Vandewater (4 Den., 349), and Stanton v. Allen (5 *id.*, 434), are, we think, decisive authorities in support of the judgment in this case. They were cases of combinations between transportation lines on the canals, to maintain rates for the carriage of goods and passengers, and the Court, in those cases, held that the agreements were *void*, on the ground that they were *agreements to prevent competition*, and the doctrine was affirmed that agreements having that purpose, made between independent lines of transportation, were, in law, agreements injurious to trade. In those cases it was not shown that the rates fixed were excessive. The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are in contemplation of law injurious to trade, *because they are liable to be injuriously used*.

"The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. There are some limitations in the constitution of the exchange, but these may be changed and the price of coal may be unreasonably advanced."

* * * * *

"If agreements and combinations to prevent competition in prices are or *may be* hurtful to trade, the only sure remedy is to prohibit all agreements of that character."

"If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing."

* * * * *

"The offense of conspiracy was complete at common law on proof of the unlawful agree-

ment. It was not necessary to allege or prove any overt act in pursuance of the agreement." *People v. Sheldon*, 139 N. Y., 251.

In (1904) in a case presenting an agreement to maintain prices of copyrighted books providing that if any dealer should undersell such prices, *none* of the manufacturers or other dealers *would sell to* or buy from such *cut rate dealer*, any book of any description whatever.

The Court, per Parker, Chief Judge:

"It is not of moment whether such a result is probable or not, for the test to be applied is, What may be done under the agreement?"

71. *Lough v. Outeridge*, 143 N. Y., 271 (1894), is supposed to be opposed to the above decisions, but that case was not based upon the law relating to combinations to suppress competition, but on those regulating discriminations made by carriers in favor of shippers.

O'Brien, J., however, in giving the opinion of the Court said:

"A common carrier is subject to an action at law for damages in case of refusal to perform its duties to the public for a reasonable compensation, or to recover back the money paid when the charge is excessive."

"There can be no doubt that at common law a common carrier undertook generally, and not as a casual occupation, to convey and deliver goods for a reasonable compensation as a business, with or without a special agreement, and for all people indifferently, and in the absence of a special agreement, he was bound to treat all alike in the sense that he was not permitted to charge any one an excessive price for the services. He has no right in any case while engaged in this public enjoyment to exact from any one anything beyond what under the circumstances is reasonable and just."

b. The scheme of the Conference in the Mogul case differs radically from the one in this case.

72. There the scheme did simply "allow a rebate of 5 per cent on the freight charged," to "importers who confine their shipments" with the Conference. No additional primage exacted to be forfeited in case of disloyalty, no penalizing of disloyal shippers was done, no penalizing of disloyal *consignees* in South Africa over whose loyalty or disloyalty the New York shippers had no control, no fifteen months' terms of probation was inflicted.

Even then Lord Hannan there held that "the combination which was proved to exist *was illegal as being in restraint of trade.*"

c. The action brought in the Mogul case differs in its inherent nature from the one in this case.

The action in that case was not brought by a shipper, but by a competitive steamship owner.

The plaintiff there brought action for damages for a conspiracy to prevent plaintiff's steamship from carrying on their trade between London and China and an injunction against the continuance of the alleged wrongful acts.

The nature of the action brought by the rival shipowner for damages and for an injunction is what called for the basis of all arguments in the British Court. Lord Halsbury was of the opinion that the acts of the defendants were not unlawful only because they were not enforceable and distinguished his opinion from that of *Hilton vs. Eckersley* (6 E. & B., 47), wherein such an agreement was recognized as "obnoxious to public policy" and adds "in my opinion it (that case) is not an authority for the proposition that *an outsider* can plead the legality of such a contract."

Lord Bramwell, assuming the defendant's agreement to be legal, and certainly, in his opinion, not enforceable by law in England, asks, "Would a shipowner who had intended to send his ship to Shanghai,

but desisted owing to the defendant's agreement and on being told by them that they would deal with him as they had with the plaintiffs, be entitled to maintain an action against the defendants? Why not? If yes, why not every ship-owner who could say he had a ship fit for the trade but was deterred from using it?"

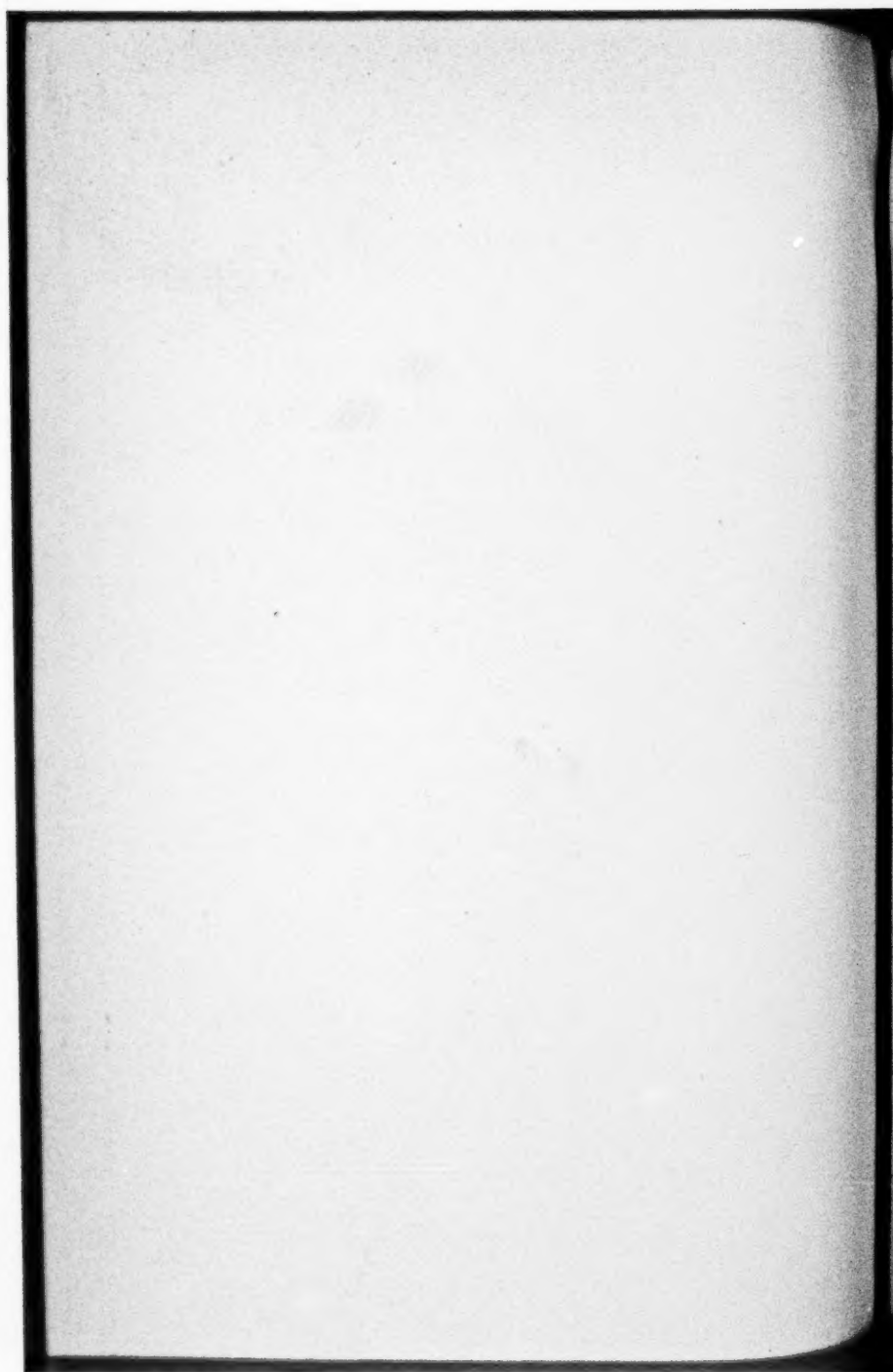
The decision of the House of Lords is pervasive in the development of this theory.

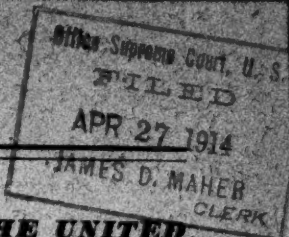
73. It is doubtful if even under our present Anti-trust Act the Hansa Line could have succeeded if it had brought such a suit in our Courts at the time when the Conference was fighting their competition during the four months in which the Hansa challenged the Conference.

74. The judgment of the Circuit Court of Appeals should be reversed and that of the Circuit Court affirmed.

New York, February 16, 1914.

LORENZO ULLO,
Of Counsel for Plaintiffs-in-Error.





**SUPREME COURT OF THE UNITED
STATES.**

No. **2**

OCTOBER TERM, **1914**

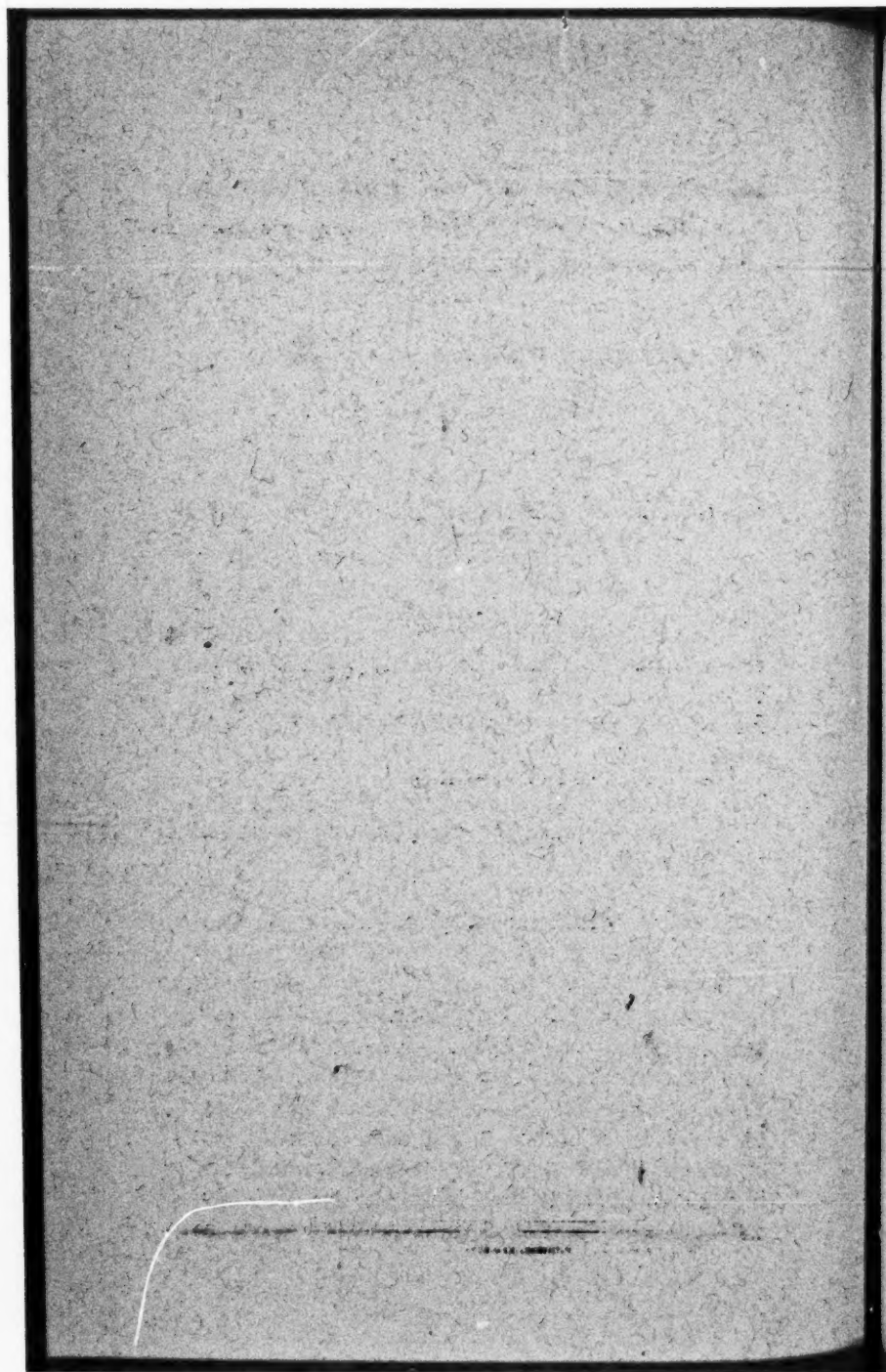
HUGO ADELBERTO THOMSEN, et al.,
Plaintiffs-in-Error (Plaintiffs below),

v.

SIR CHARLES W. CAYSER, et al.,
Defendants-in-Error (Defendants below).

**Papers in Opposition to Motion to Dis-
miss or Affirm.**

LORENZO ULLO,
Of Counsel for Plaintiffs-in-Error.



**SUPREME COURT OF THE UNITED
STATES,**

1

OCTOBER TERM 1913. No. 231.

HUGO ADELBERTO THOMSEN *et*
al.,

Plaintiffs in Error,

against

SIR CHARLES W. CAYSER *et al.*,
Defendants in Error.

And now come the plaintiffs in error, by their 2
counsel, and in opposition to the motion of the
defendants in error and on the Transcript of
Record and on the annexed Affidavit, allege and
state:

1. That the Writ of Error to the Circuit Court
of Appeals was properly issued in pursuance of
the judgment of the said Circuit Court of Ap-
peals entered on November 16, 1911. (Gelston
v. Hoyt, 3 Wheaton, 303; Atherton v. Fowler,
91 U. S., 143.) The mandate of the Circuit Court
of Appeals issued upon said judgment was prop-
erly never recalled. The judgment entered upon
said mandate remains the judgment of the Cir- 3
cuit Court for the Southern District of New
York pending the determination of this Court
on the Writ of Error to the said Circuit Court
of Appeals, and the Order suspending and stay-
ing the execution of said judgment until the final
determination of this Supreme Court upon the

Writ of the Error allowed, is the only proper procedure in order to avert the effects of said judgment meanwhile.

2. The judgment of the Circuit Court of Appeals as entered on November 16, 1911, was not entered upon any waiver by the plaintiffs of any errors assignable to said judgment whereby the plaintiffs feel to have been aggrieved ~~by plaintiff in error herein~~ and was not a judgment requested and consented to by the plaintiff in error herein.

3. The opinion upon the judgment, as at first rendered, stated and found that it was "the contention of the parties upon the facts shown" that the said Circuit Court of Appeals could then and there determine the legality of the combination complained of, and which is the subject matter of the cause of action.

4. The petition of the plaintiff in error filed after that the judgment of the Circuit Court of Appeals was first rendered asked for a rehearing of the case or for a certificate to the Supreme Court on questions of law, such as are presented by the record and by the said respective contentions of the parties before the Circuit Court of Appeals, ~~not determined the legality of the combination and~~ which contentions said Court stated it was "impossible for it to hold as matter of law that the acts of the defendants as disclosed upon the present record amount to a combination unlawful within the meaning of the statute."

5. The defendants in error herein, defendants below acquiescing in the judgment finally ren-

dered by the Circuit Court of Appeals, on the 17th day of November, 1911, caused "*on motion of Convers & Kirlin, attorneys for the said defendants,*" said judgments to be filed and made the decree and order of the Circuit Court for the Southern District of New York and thereupon the complaint of plaintiff was dismissed with costs to the said defendants.

Dated, April 17, 1914.

LORENZO ULLO,
Attorney & Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED
STATES,

8

OCTOBER TERM 1913. No. 231.

HUGO ADELBERTO THOMSEN *et al.*,

Plaintiffs in Error,

against

SIR CHARLES W. CAYSER *et al.*,
Defendants in Error.

State of New York,
City of New York,
County of New York, } ss.:

9

Lorenzo Ullo, being duly sworn, says:

1. I am the attorney and counsel for the plaintiffs in error herein.

2. I have read the affidavit of Charles R. Hickox made on the motion to dismiss and some
10 corrections as to the facts therein stated are necessary.

3. It is not correct as is stated in that affidavit that his Honor, Judge Hazel, "left to the jury merely the matter of amount of the plaintiff's damages."

4. That the petition for rehearing mentioned in the said affidavit was duly filed on August 28, 1911, in the Circuit Court of Appeals; that is, during the October Term of 1910 of the said Circuit Court of Appeals for the Second Circuit. That a decision upon said Petition was
11 handed down on October 23, 1911, to wit: during the October Term of 1911 of the said Court, and the final judgment herein entered by the said Circuit Court of Appeals upon said Petition was filed on November 16, 1911, and in due time during the said October Term 1910.

5. That the judgment of the Circuit Court of Appeals entered finally in the case is as follows:

"A petition for rehearing having been filed herein by counsel for the defendants in error;

Upon consideration thereof it is

12 Ordered that said petition be and hereby is granted, and that the mandate of this Court issued herein on August 9, 1911, be and hereby is recalled.

It is further ordered that the order of this Court filed and entered herein on July 26, 1911, is vacated and set aside, and the judgment of the Circuit Court of the United States for the Southern District of New

York, be and hereby is reversed with costs, and that this cause be remanded to said Circuit Court with instructions to enter an order dismissing the complaint. 13

It is further ordered that a mandate issue accordingly." (Fol. 362.)

6. The Writ of Error to the said Circuit Court of Appeals was issued on a petition filed in said Court on March 15, 1912 (fol. 365), and an Order allowing the Writ of Error and "that all further proceedings on the part of the defendants below, of said judgment be suspended and stayed until the final determination of the Supreme Court of the United States upon the Writ of Error herein granted was duly entered and filed on March 15, 1912."

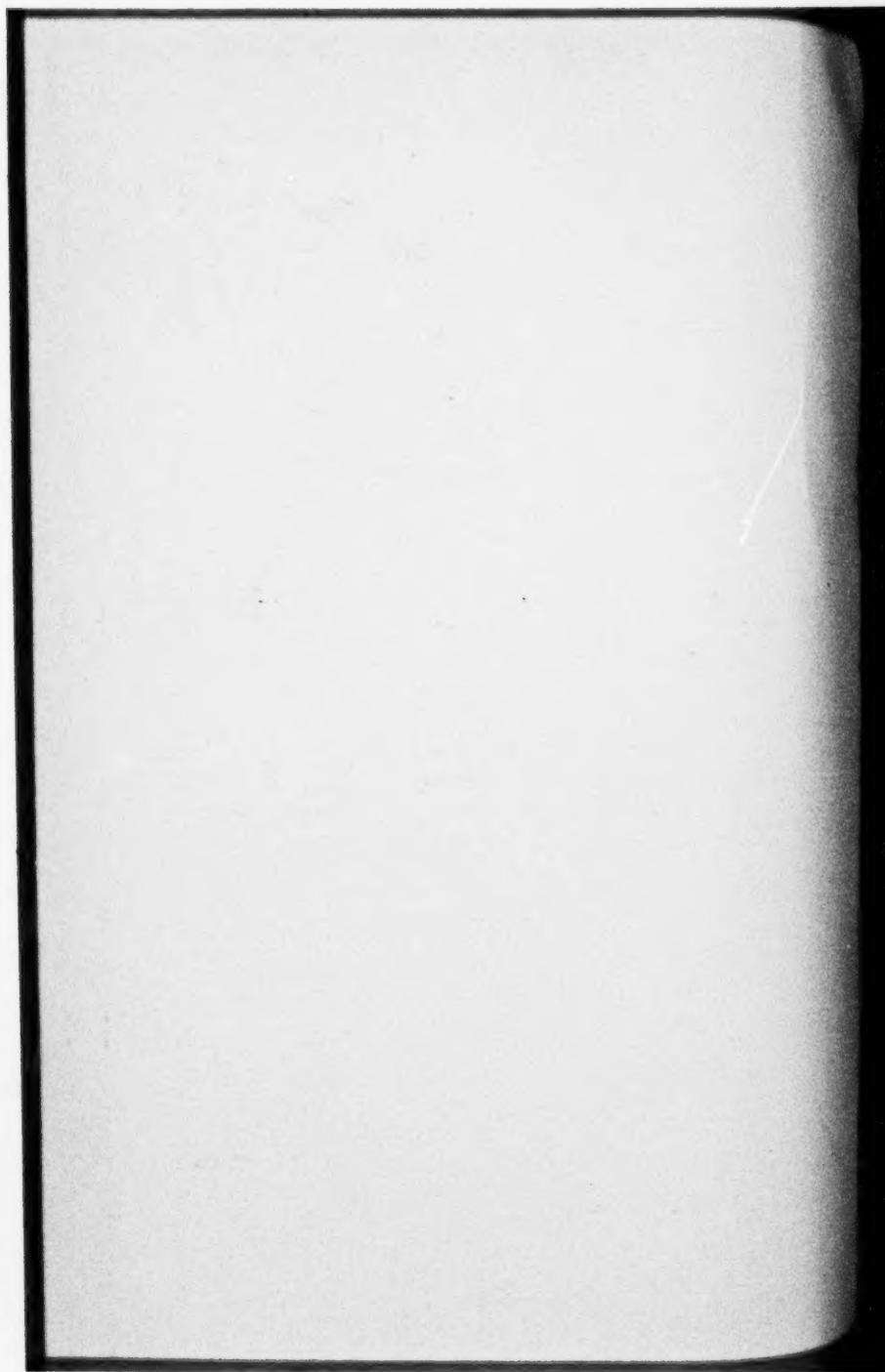
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LORENZO ULLO.

Sworn to before me this 20th
day of April, 1914.

JAMES A. BEHA,
Notary Public,
N. Y. Co.

15



SUPREME COURT OF THE
UNITED STATES,

OCTOBER TERM 1913—No. 231.

HUGO ADELBERTO THOMSEN *et al.*,
Plaintiffs in Error,

2

AGAINST

CHARLES W. CAYSER *et al.*,
Defendants in Error.

SIR:

PLEASE TAKE NOTICE, that the annexed motion to dismiss or affirm will be presented to the Court 3 on Monday, March 23, 1914, or at the argument of the case, if the argument shall be heard at an earlier day.

Dated: February 28, 1914.

THOMAS THACHER,
J. PARKER KIRLIN,
Counsel for Defendants in Error.

To

LORENZO ULLO, Esq.,
Counsel for Plaintiffs in Error.

4

5 SUPREME COURT OF THE
UNITED STATES,

OCTOBER TERM 1913—No. 231.

HUGO ADELBERTO THOMSEN *et al.*,
Plaintiffs in Error,

6 AGAINST

SIR CHARLES W. CAYSER *et al.*,
Defendants in Error.

Motion to
Dismiss or
Affirm.

And now come the defendants in error, by their counsel, and move, on the Transcript of Record and on the annexed affidavit, certificate and judgment, to dismiss the writ of error or affirm the
7 judgment herein, for the following reasons:

1. The case is dead. The mandate of the Circuit Court of Appeals, issued in pursuance of its judgment entered November 16, 1911, was filed in the Circuit Court, to which it was directed, and judgment on the mandate dismissing the complaint in the action was entered in the Circuit Court on November 24, 1911. The mandate of the Circuit Court of Appeals was never recalled.
- 8 No writ of error has been allowed to the Judgment of the Circuit Court. No proceedings have been taken in the Circuit Court with the view to vacating or setting aside the said judgment. The term of the Circuit Court at which the judgment was entered expired on the first Tuesday of January, 1912. All power and authority of this

Court, of the Circuit Court of Appeals, and of the 9
Circuit Court to vacate and set aside said final
judgment of the Circuit Court has ceased and ex-
pired.

2. The Circuit Court of Appeals was without
jurisdiction to allow the writ of error on March
15, 1912, for the reason that its judgment had be-
come executed and the judgment entered thereon
in the Circuit Court on November 24, 1911, had 10
become final and irrevocable before the petition
for the writ was filed and the order allowed.

3. The judgment of the Circuit Court of Ap-
peals, entered November 16, 1911, to which the
writ of error was allowed on March 15, 1912, was
entered in the form finally adopted at the request
of the plaintiffs and by their consent, and the
errors assigned by the plaintiffs in error were 11
waived by such request and consent.

Dated: February 28, 1914.

THOMAS THACHER,
J. PARKER KIRLIN,
Counsel for Defendants in Error.

To

LORENZO ULLO, Esq.,
Counsel for Plaintiffs in Error.

13

SUPREME COURT OF THE
UNITED STATES,

OCTOBER TERM 1913—No. 231.

HUGO ADELBERTO THOMSEN *et al.*,
Plaintiffs in Error,

14

AGAINST

SIR CHARLES W. CAYSER *et al.*,
Defendants in Error.

STATE OF NEW YORK,
City and County of New York, } ss.:

CHARLES R. HICKOX, being duly sworn, says:

15 1. I am a member of the firm of Convers & Kir-
lin, attorneys of record for the defendants in
error herein who were defendants below. I have
personal knowledge of the proceedings on the
trials and appeals in this cause.

16 2. This action was instituted by the plaintiffs
against the defendants in the United States Cir-
cuit Court for the Southern District of New York
to recover treble damages from the defendants
under Section 7 of the Sherman Anti Trust Act.
The plaintiffs are merchants in the City of New
York, and the defendants are owners and agents
of various steamship lines engaged in trade be-
tween the Port of New York and ports in South
Africa.

3. On the first trial of the action, the complaint 17 was dismissed by Judge Hough. On a writ of error sued out by the plaintiffs the Circuit Court of Appeals reversed that judgment, and ordered a new trial. Judge Hazel, on the new trial, refused to allow the defendants to go to the jury on the question whether the agreement between the defendants constituted an unlawful combination and was an undue or unreasonable restraint of trade, and held, as a matter of law, that the 18 plaintiffs were entitled to recover damages sustained by them, if any, and left to the jury merely the matter of amount of the plaintiffs' damages. On a writ of error sued out by the defendants, the Circuit Court of Appeals reversed the judgment of the Circuit Court, which was entered on the verdict of the jury, and ordered a new trial. *Opinion, Record, p. 203; Judgment, p. 206.*

19

4. After the mandate upon the judgment of the Circuit Court of Appeals had been issued to the Circuit Court, the plaintiffs presented a petition for a rehearing, and prayed that final judgment be entered on the record. Pp. 207-210. The Court of Appeals, in an opinion on that petition, said:

"We understand from the petition of the plaintiffs below that they do not desire to present additional testimony and do not wish a new trial of this action. We understand also that they are willing to stand on the record as made, and that they prefer instead of a decision granting a new trial, a decision reversing the judgment and directing the Circuit Court to dismiss the complaint in order that they may carry the case to 20

21 the Supreme Court without further delay. If we are correct in this supposition, we are prepared to recall the mandate, order a rehearing, reverse the judgment and direct the Circuit Court to dismiss the complaint."

Counsel for the plaintiffs thereupon wrote to the Clerk, requesting him to enter an order granting a rehearing and recalling the mandate in accordance with the petition for rehearing. The
 22 letter was duly filed. *Record*, pp. 210, 211. Thereupon the Court, after the receipt of the letter, entered an order recalling its previous mandate, vacating and setting aside its previous judgment, and further ordering that the

"Judgment of the Circuit Court of the United States for the Southern District of New York be and hereby is reversed with costs, and that this
 23 cause be remanded to said Circuit Court with instructions to enter an order dismissing the complaint" and that a "mandate issue accordingly." *Record*, p. 211. This order or judgment was entered November 16, 1911.

5. A mandate was duly issued in accordance with said order or judgment, and that mandate was filed in the Circuit Court, and, in accordance with its directions, a judgment was entered in the
 24 office of the Clerk of the Circuit Court for the Southern District of New York on November 24, 1911. A copy of the judgment was served on the plaintiffs' attorneys on the same date. A certified copy of the judgment, with an admission of service endorsed thereon, is hereto annexed, and made a part of this affidavit.

6. The term during which the said judgment in 25
the Circuit Court was entered expired on the first
Tuesday of January, 1912, at which date, in ac-
cordance with the Judiciary Act of March 3, 1911,
Section 97, the first term began of the United
States District Court for the Southern District
of New York, which succeeded the Circuit Court
for that district.

7. The plaintiffs did not during the term in 26
which said judgment of the Circuit Court was en-
tered, nor at any time thereafter, make any appli-
cation to recall the mandate under which it was
entered, or vacate or set aside the judgment, nor
has it sued out any writ of error thereto. The
said judgment stands of record as a final disposi-
tion of the suit between the parties.

8. The plaintiffs took no further steps in this 27
action for nearly four months after November
24, 1911, when the judgment was entered in the
Circuit Court. On March 15, 1912, they pre-
sented a petition for writ of error, and obtained
an order allowing the writ. *Record*, pp. 213, 214.
The writ of error provided that, on filing of a
bond for \$1,000, all further proceedings upon the
part of the defendants for the enforcement of the
judgment of the Circuit Court of Appeals be sus- 28
pended. Pp. 213, 214. But no application or order
was made which referred in any manner to the
judgment of the Circuit Court which had been
entered on November 24, 1911, in pursuance of
the mandate of November 16, 1911. As a matter
of fact, at the time the writ of error was allowed,

29 the judgment of the Circuit Court of Appeals had become executed by the filing of its mandate in the Circuit Court and the entry of judgment thereon.

CHARLES R. HICKOX.

Sworn to before me this 28th }
day of February, 1914. }

ANNE C. BARNES,
Notary Public,
30 Kings Co.

Certificate filed in New York Co., No. 33.

31

32

At a Stated Term of the United States 33
 Circuit Court for the Southern
 District of New York, held in
 the United States Circuit Court
 Rooms in the Post Office Build-
 ing, County and City of New
 York, on the 24th day of No-
 vember, 1911.

Present—HON. E. HENRY LACOMBE,
 U. S. Circuit Judge. 34

HUGO ADELBERTO THOMSEN, GUSTAV
 A. FEDDERSON, HEINRICH JO-
 HANNES RIEDEL, and EDWARD H.
 MULLER, composing the firm of
 THOMSEN & Co.,

Plaintiffs,

AGAINST

35

UNION CASTLE MAIL STEAMSHIP COM-
 PANY, LIMITED; SIR CHARLES W.
 CAYSER, CHARLES W. CAYSER, JR.,
 AUGUST B. T. CAYSER, ARTHUR E.
 D. CAYSER, HERBERT R. CAYSER,
 HUGH GIBB, JOHN JOSS, G. T.
 POSTLOCK and JOHN PERCIVAL,
 composing the firm of CAYSER,
 IRVINE & Co.; BUCKNALL STEAM-
 SHIP LINES, LIMITED; SIR DONALD
 CURRIE, SIR FRANCIS HENRY
 EVANS, DAVID MARTIN CURRIE,
 FREDERICK JAMES MIRRIELES,
 GEORGE ALEXANDER KEITH WISELY,
 PERCY ALPORT MOLTEÑO, ALASTAIR
 CURRIE, JOHN MACMARTIN CURRIE
 and MURLAND DE GRASSE EVANS,

Judgment
 on Mandate. 36

- 37 composing the firm of DONALD CURRIE & COMPANY; HERBERT BARBER and JAMES BARBER, composing the firm of BARBER & Co.; EDWARD N. NORTON and SKEFFINGTON S. NORTON, composing the firm of NORTON & SON,
Defendants.

- 38 A final judgment having been entered herein on the 28th day of April, 1909, whereby it was ordered and adjudged "that the plaintiffs Hugo Adelberto Thomsen, Gustav A. Feddersen, Heinrich Johannes Riedel and Edward H. Muller, composing the firm of Thomsen & Co., recover against the defendants, Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh
- 39 Gibb, John Joss, J. T. Portlock and John Percival, composing the firm of Cayser, Irvine & Company; Herbert Barber and James Barber, composing the firm of Barber & Company; and Edward N. Norton and Skeffington S. Norton, composing the firm of Norton & Son, the sum of Twenty-two thousand seven hundred nineteen and 18/100 Dollars (\$22,719.18), being threefold the damages sustained by plaintiffs as found by
- 40 the jury, together with Twenty-five hundred Dollars (\$2500), the amount fixed by the Court as above stated as a reasonable attorney's fee, with Twenty-one Dollars (\$21.00)) interest from the 23rd day of April, 1909, to this date, and Seventy and 72/100 Dollars (\$70.72) the amount of plaintiff's costs as taxed, amounting in all to the sum

of Twenty-five thousand three hundred ten and 91/100 Dollars (\$25,310.91), and that execution issue against the said defendants accordingly"; and a writ of error to the United States Circuit Court of Appeals for the Second Circuit having been taken from the said judgment by the defendants, Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, J. T. Portlock and John Percival, composing the firm of Cayser, Irvine & Company; Herbert Barber and James Barber, composing the firm of Barber & Company; and Edward N. Norton and Skeffington S. Norton, composing the firm of Norton & Son; and the said Circuit Court of Appeals having entered a decree and issued a mandate in this action on August 9th, 1911, whereby it was ordered, adjudged and decreed that the judgment of the Circuit Court be reversed with costs and that the cause be remanded to the Circuit Court for a new trial; and a petition for rehearing having been filed by the above named plaintiffs in the said Circuit Court of Appeals; and the said Circuit Court of Appeals having on November 17th, 1911, entered an order, a certified copy of which is filed herewith and made a part of this final judgment, whereby the said Circuit Court of Appeals granted said petition, recalled the mandate of August 9th, 1911, vacated and set aside the order on which the said mandate was granted, reversed the judgment of the Circuit Court with costs and directed that this cause be remanded to the Circuit Court

- 45 with instructions to enter an order dismissing the complaint and that a mandate issue accordingly; and the Circuit Court of Appeals having made and entered a decree on the 17th day of November, 1911, whereby it was ordered, adjudged and decreed "that the judgment of the said Circuit Court be and it hereby is reversed with costs taxed at the sum of \$586.02, and that the cause be remanded to said Circuit Court with instructions to enter an order dismissing the complaint"; and the said Circuit Court of Appeals having issued its mandate to this Court commanding that further proceedings be had in accordance with the said decision;
- 46

It is now, on motion of Convers & Kirlin, attorneys for the defendants,

ORDERED AND ADJUDGED:

- 47 1. That the mandate of the United States Circuit Court of Appeals for the Second Circuit, dated and issued on the 17th day of November, 1911, be filed and made the decree and order of this Court, and that the judgment in favor of the defendants for costs and the order for a new trial entered herein on or about August 17th, 1911, be vacated and set aside.
- 48 2. That the judgment of the United States Circuit Court for the Southern District of New York, for \$25,310.90, entered herein in favor of the plaintiffs on or about April 28th, 1909, be and it hereby is reversed with costs and that the complaint herein be and it hereby is dismissed.

3. That the defendants, Sir Charles W. Cayser, Charles W. Cayser, Jr., August B. T. Cayser, Arthur E. D. Cayser, Herbert R. Cayser, Hugh Gibb, John Joss, J. T. Portlock and John Percival, composing the firm of Cayser, Irvine & Company; Herbert Barber and James Barber, composing the firm of Barber & Company; and Edward N. Norton and Skeffington S. Norton, composing the firm of Norton & Son, recover of the plaintiffs the sum of \$586.02, their costs in the Circuit Court of Appeals as taxed, with interest thereon until paid, and that the defendants have execution forthwith against the plaintiffs for the amount of this judgment. 49 50

4. That any bond or undertaking on appeal given herein by or on behalf of the defendants be and the same hereby is cancelled and discharged of record. 51

E. H. LACOMBE,
U. S. Circuit Judge.

[Endorsed:]—United States Circuit Court Southern District of New York.—Hugo Adelberto Thomsen *et al.*, Plaintiffs, against Union Castle Mail S. S. Co., *et al.*, Defendants.—(Copy)—Judgment on Mandate.—Convers & Kirlin, Attorneys for Defendants, 27 William Street, New York, N. Y.—Sirs: Please take notice that a final judgment, of which the within is a copy, was filed and entered in the office of the clerk of this Court, on November 24th, 1911. Yours, &c., Convers & Kirlin, attorneys for Defendants.—To Messrs. Ullo, Ruebsamen & Yozzolino, 52

- 53 Attorneys for Plaintiffs.—Due service of a copy of the within, and of the foregoing notice, is acknowledged, Nov. 24, 1911—Ullo, Ruebsamen & Yozzolino, Attorneys for Plaintiffs.

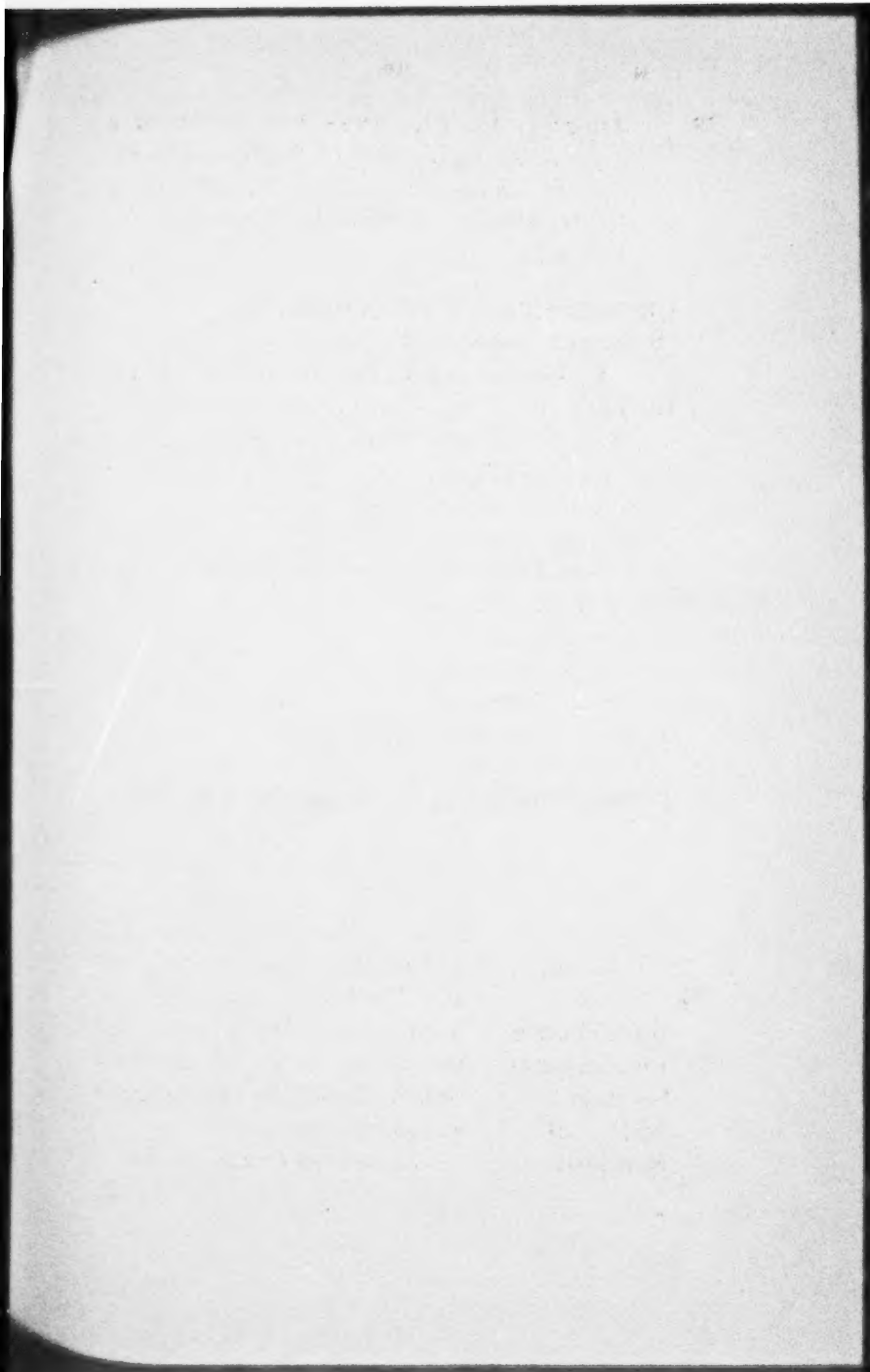
UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF NEW YORK, } ss.:

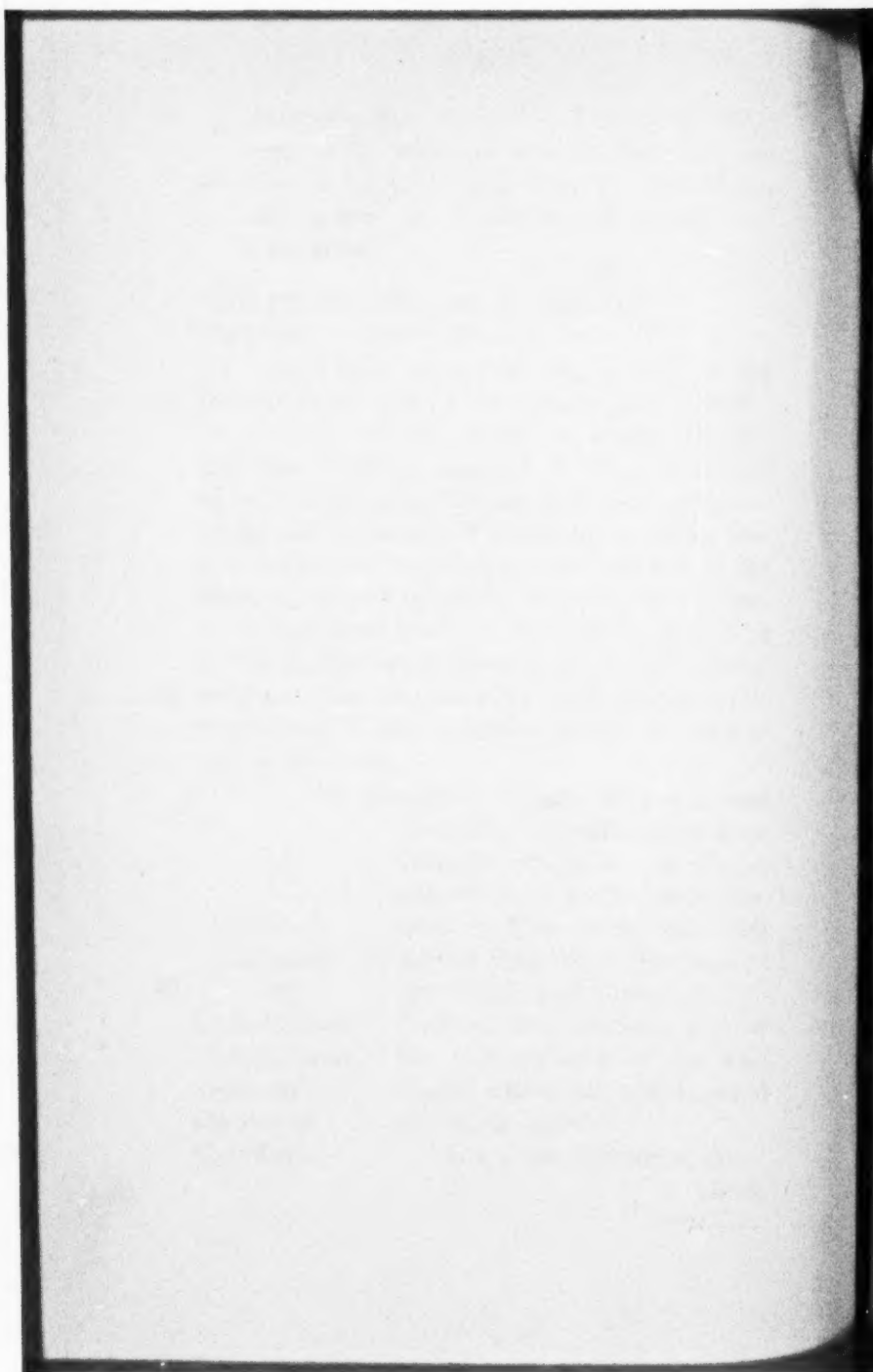
- I, ALEXANDER GILCHRIST, JR., Clerk of the
54 District Court of the United States for the Southern District of New York, do hereby Certify that the Writings annexed to this Certificate have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals. I further certify that
55 no writ of error has been sued out of or filed of record in this court affecting the annexed judgment and that no motion to vacate the same, or proceedings to stay execution thereof are of record in this court.

IN TESTIMONY WHEREOF I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 26th day of February in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the said United States the one hundred and thirty-eighth.

[SEAL]
56 of
United States
District Court,
Southern
District of
New York.

ALEXANDER GILCHRIST, JR.,
Clerk.





Supreme Court of the United States.

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No. 2.

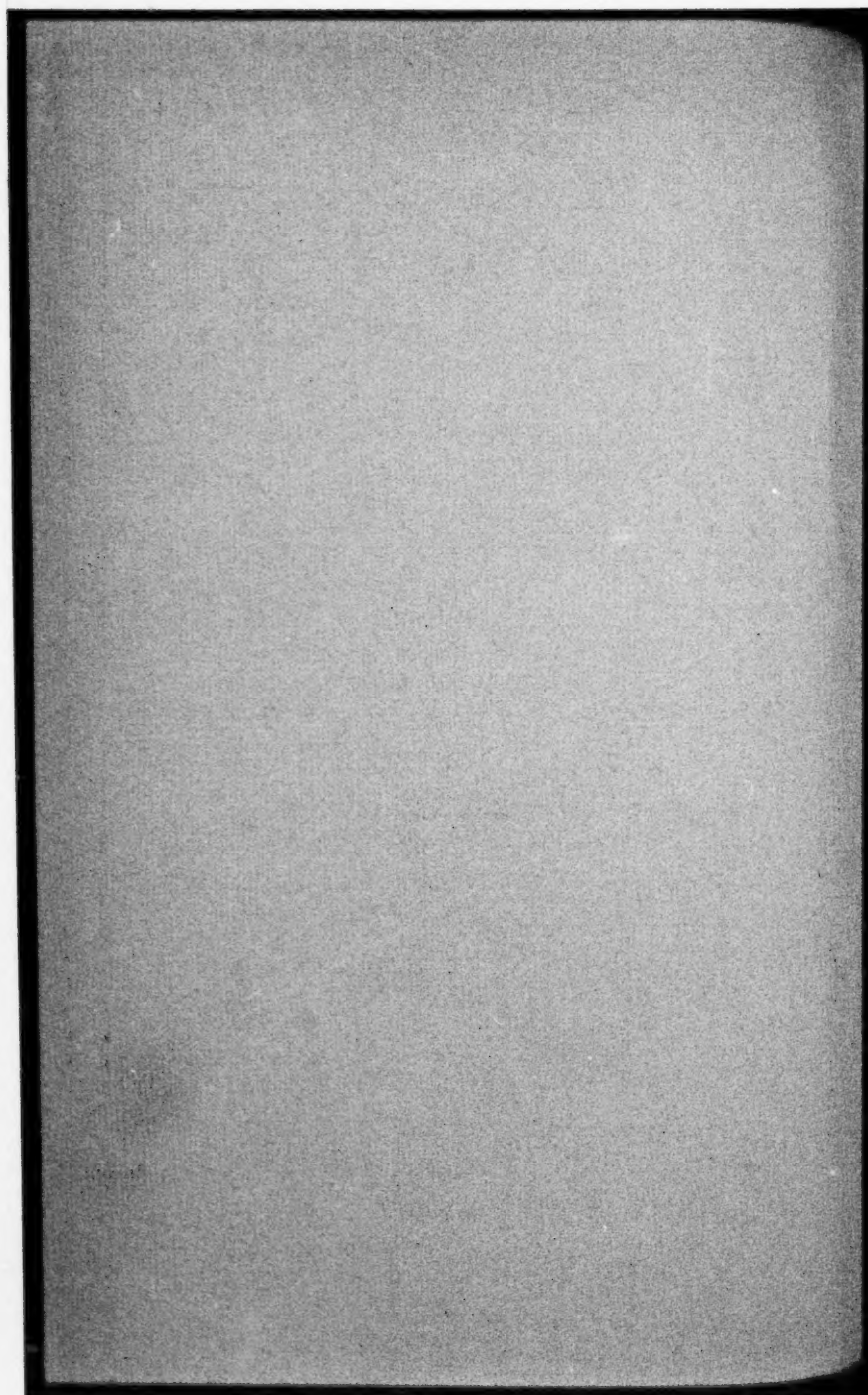
OCTOBER TERM, 1916.

HUGO ADELBERTO THOMSEN *et al.*,
Plaintiffs-in-Error,
(*Plaintiffs at trial*),
vs.

SIR CHARLES W. CAYSER *et al.*,
Defendants-in-Error,
(*Defendants at trial*).

Supplemental Brief for Plaintiffs-in-Error.

A. LEO EVERETT,
Counsel for Plaintiffs-in-Error.



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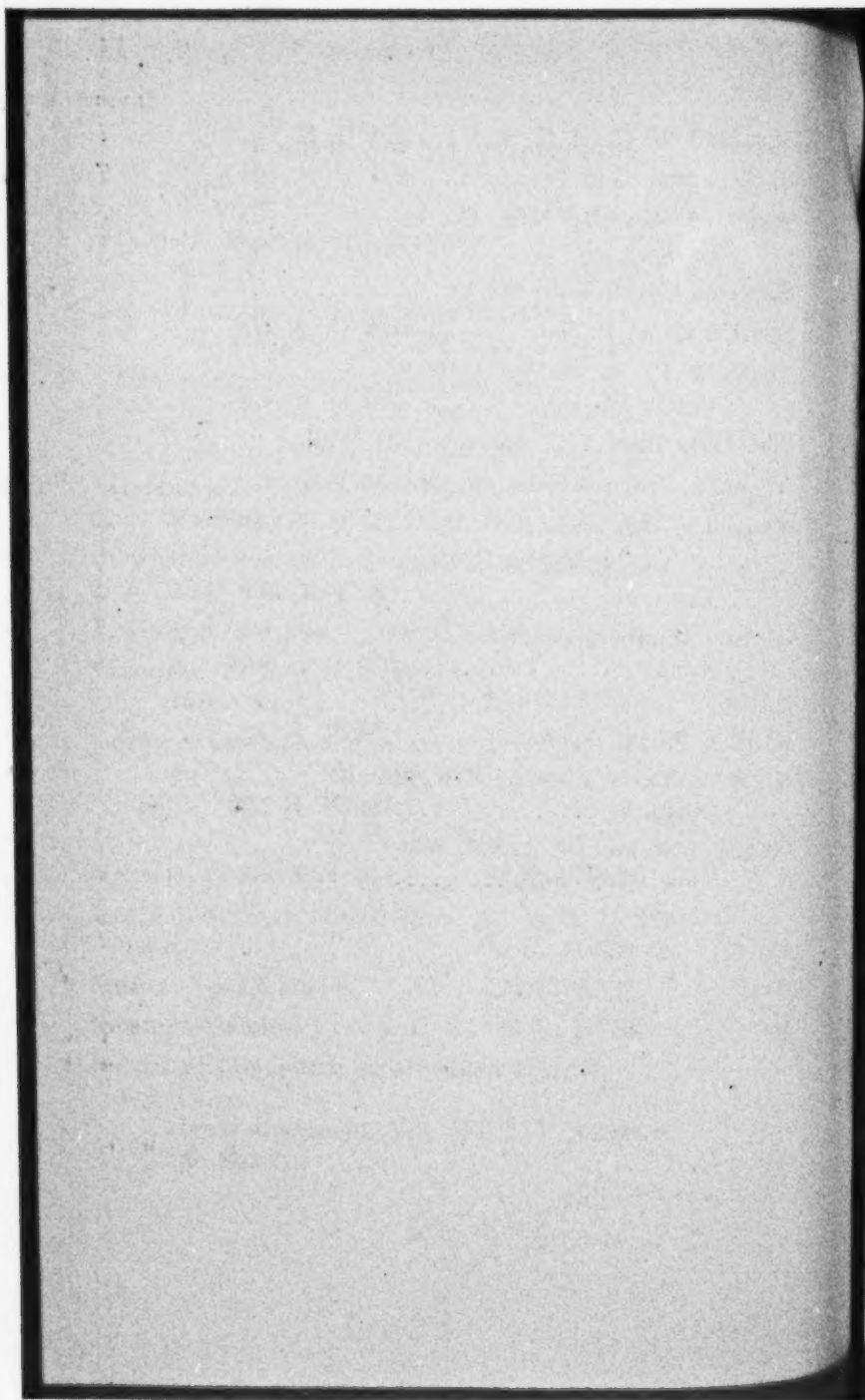
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Supreme Court of the United States

No. 2.

OCTOBER TERM, 1916.

HUGO ADELBERTO THOMSEN *et al.*,
Plaintiffs-in-Error
(Plaintiffs at Trial),

vs.

SIR CHARLES W. CAYSER *et al.*,
Defendants-in-Error
(Defendants at Trial).

SUPPLEMENTAL BRIEF FOR PLAINTIFFS-IN-ERROR.

Statement.

This cause has been argued before this Court and ordered to be restored to the docket for re-argument. In the meantime, Dr. Lorenzo Ullo, counsel for the plaintiffs-in-error, has died, and A. Leo Everett has been substituted as their counsel.

The facts in the case have been fully set forth in the principal brief.

POINT I.

The reversal by the Circuit Court of Appeals was erroneous because the ground upon which it was based had not been asserted by defendants-in-error either upon the trial or in their assignments of error.

The Circuit Court of Appeals upon the second appeal held that the Trial Judge should not have instructed the jury that the combination was illegal, because it was impossible to say, as a matter of law, that it was in unreasonable restraint of trade within the meaning of the Sherman Act as interpreted in the Standard Oil and Tobacco cases (pp. 203-204).

This was the only point discussed by the Circuit Court of Appeals. It was not open for review, for, as pointed out in the minority opinion (p. 205), it was not presented by either exception or assignment of error. Moreover, the ruling was expressly acquiesced in by the defendants.

"Mr. Kirlin : If your Honor please, I desire to **except** to those parts of your charge in which you instructed the jury that all the defendants, including the agents, had in fact entered into a combination which was contrary to statute, and request that the question whether they had unduly entered into a combination unlawfully, within the definition of the Court, be left to the determination of the jury" (pp. 162-163).

The assignments of error, based upon this exception, are substantially a reiteration of the point (pp. 195-196).

The Circuit Court of Appeals had no jurisdiction to review an error in the Judge's charge as to which no exception had been taken or assignment of error filed.

Supreme Court Rule No. 1 V.

Lindsay v. Burgess, 156 U. S. 208.

Tromp v. Cramp & Sons, etc., Co., 143 Fed. 867.

POINT II.

The Trial Judge committed no error in undertaking to give instructions as to the lawfulness of the combination.

The sole ground of reversal asserted by the Circuit Court of Appeals was that the Trial Judge undertook to charge that the combination was unlawful, whereas he should have left that question for the jury, to be decided according to whether or not it thought that the combination was in unreasonable restraint of trade. The Circuit Court of Appeals does not find that there was any conflict in the testimony. The minority opinion points out that the evidence in this connection was uncontradicted. The Circuit Court of Appeals, therefore, has announced a novel doctrine. The legality of certain given acts has hitherto uniformly been a matter for the Court to decide. In many instances the question is raised by demurrer. When the Court makes its ruling upon the demurrer, this decision, whether by the Trial Court or by the Circuit Court of Appeals, becomes the law of the case and the jury is bound to observe the law so laid down. The practice is just the same when no demurrer is interposed. A good instance of the way the law under the Sherman Act is worked out is *Loewe vs. Lawlor*. That was an action for triple damages, in which the plaintiff, Lawlor, complained that the defendants had combined to obstruct and injure his business by preventing his customers from buying his goods by means of a boycott. At the first trial the Trial Judge took away from the jury the determination of all questions except the amount of damages. He did this in view of the previous decision, on demurrer, of *Loewe vs. Lawlor*, 208 U. S. 274. The Circuit Court of Appeals held that the instruction to the jury was too broad. While the Trial Judge was right in having,

in conformity to the decision of the Supreme Court, charged that the facts constituted an unlawful combination under the Sherman Act, there was an issue for the jury in the question whether the particular individuals named as defendants were accessory to the combination (*Lawlor vs. Loewe*; 187 Fed. Rep. 522).

The cause again went to trial and the plaintiff again recovered a verdict. Upon the second trial the Judge charged:

"Now, if this evidence falls short of satisfying you that certain of these defendants did know of this *unlawful conspiracy*, or were in duty bound to know of it, or did tacitly approve of it, then such defendants should be acquitted, if any there may be."

Evidently the Judge took from the jury the question whether the conspiracy was or was not unlawful. The instruction was approved by the Circuit Court of Appeals in *Lawlor v. Loewe*, 209 Fed. Rep. 721. This disposition of the issues apparently met with no objection (see *Lawlor v. Loewe*, 235 U. S. 522).

It cannot have been the intention of this Court in deciding the *Standard Oil* and *Tobacco* cases to change the law and practice in the instruction of juries in actions for damages under the Sherman Act.

That the rule was not changed by those decisions appears from *U. S. v. Pacific & Arctic Co.*, 238 U. S. 87. There the Government sought to review a decision of the lower Court sustaining a demurrer to an indictment charging a combination in violation of the Anti-trust Act. The Court had to determine whether the allegations of the indictment constituted a charge of crime. It held that they did, citing *Swift & Co. v. U. S.*, 196 U. S. 375, and *Standard Sanitary Manufacturing Co. v. U. S.*, 226 U. S. 20, and concluded:

"In those cases, as here, the purpose (the means being different) was the prevention or destruction of

competition, and the agreements here are exactly adapted to the purpose." (p. 104.)

After such a ruling it was the duty of the District Judge when the cause went to trial to declare the law announced by this Court and to instruct the jury that if the evidence sustained the allegations of the indictment they should find a verdict for the Government. This, certainly, would not be leaving to the jury the question of the reasonableness of the restraint of trade. That question had been determined by the Supreme Court in the exercise of its function of determining the lawfulness of any combination upon admitted facts.

The duty of the Trial Judge in cases involving the criminality of combinations was pointed out in *Attorney General v. Adelaide S.S. Co.*, A. C. (1913) 781. The Court had to construe the Australian Act, No. 9, of 1906, which made it illegal to combine for the purpose of restraining trade or commerce to the detriment of the public or to destroy any Australian industry, the preservation of which was advantageous to the commonwealth. This qualification, that the act complained of must be "to the detriment of the public," is what distinguished the Australian Act from the Sherman Act. A prosecution was instituted under the Act against a combination in the coal trade. The defendants were found guilty and fined. Upon appeal the Privy Council held that no offense had been committed because the combination was not one which was to the public detriment. The Privy Council recognized that the statute created new rights and remedies and that but for it a criminal prosecution would not lie. It added, referring to the duty of the Court:

"Further, it must be remembered that the question whether a restraint of trade is reasonable either in the interest of the parties or in the interest of the public is a question for the court, to be determined after construing the contract and con-

sidering the circumstances existing when it was made. It is really a question of public policy and not a question of fact upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible." (p. 797.)

In this case the undisputed evidence shows a combination organized for the suppression of competition in the carriage of merchandise by the following methods:

- (I) Agreement as to rates and sailings among the members of the "Conference."
- (II) A rebate to shippers who gave their patronage exclusively to the combination.
- (III) The employment of "fighting ships" to drive out rival carriers.

If the lawfulness of such a scheme as this is not for the Court to decide there will be no case of combination in which the issue can be withdrawn from the jury, and the "great body of precedents on the civil side" (*International Harvester Co. v. Kentucky*, 234 U. S. 216, p. 223), which have been amassed in the last thirty years, will be valueless.

POINT III.

The combination was unlawful.

It was organized by certain ship owners for the purpose of getting all the New York-South African trade for themselves. The methods which it employed were, as above stated: (1) An agreement as to rates and sailings; (2) A rebate to loyal shippers; (3) The employment of fighting ships to drive out rival carriers.

The general purpose of the scheme, as well as the means employed to carry it out, is condemned by the Sherman Act as interpreted by the decisions of this court.

In the *Standard Oil* case the Court held the combination illegal because it was made

"with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce." (221 U. S. 1, at page 75.)

In the *Tobacco* case, the same standard was applied :

"Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, etc. * * * the acts which ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination * * *." (221 U. S. 106, at pages 181 to 182.)

In *U. S. v. Pacific & Arctic Railway & Navigation Co.*, 228 U. S. 87, the Court interpreted the *Swift* case (196 U. S. 375) and the *Standard Sanitary Manufacturing Company* case (226 U. S. 20), holding:

"In those cases, as here, rights were brought forward to justify a purpose which transcended the limits put upon their exercise by the Anti-trust Act. In those cases, as here, the purpose (the means being different) was the prevention or destruction of competition, and the agreements here are exactly adapted to the purpose." (Pages 104-105.)

The same result will be reached if we apply the test employed by minority Justices in decisions prior to the *Standard Oil* case.

"The provision of the statute against contracts in restraint of trade has been held to apply to contracts between railroads, otherwise remaining independent, by which they restricted their respective freedom as to rates. This restriction by contract with a stranger to the contractor's business is the ground of the decision in *United States v. Joint Traffic Association*, 171 U. S. 505, following and affirming *United States v. Missouri Freight Association*, 166 U. S. 290. I accept those decisions absolutely, not only as binding upon me, but as decisions which I have no desire to criticise or abridge." (*Northern Securities Co. v. U. S.*, 193 U. S. 197, per Holmes, J., page 405.)

The case also falls within the more comprehensive definition given in *Nash v. United States*, 229 U. S. 373, 376, in that the combination prejudices the public interests "by unduly restricting competition or unduly obstructing the course of trade." (See Point V. *infra*.)

Under the principles established by these decisions the shipping "Conferences" must fall within the condemnation of the Sherman Act. This is the first case in which the lawfulness of such combinations has had to be decided by the Supreme Court, the *Hamburg-American Line case* (*U. S. v. Hamburg-American S.S. Line*, 239 U. S. 406) having been dismissed on the ground that owing to the changed conditions brought about by the war, the right of relief in equity by injunction had become an academic question. It is a singular circumstance that the Circuit Court of Appeals for the Second Circuit, which decided the *Hamburg-American Line case* (216 Fed. 971), should have failed here to apply the principle involved in that decision, for, so far as it is in authority, it is in favor of the plaintiff-in-error. In that case there was an agreement to fix the rates of all the lines in the agreement, and to regulate their sailings. So far the combination was not unreasonable, for thereby there was disclosed no intention to injure the public by a monopoly of the trade. There

was another element, however, which was alleged to have entered into the methods of this combination, namely, the employment of "fighting ships." The purpose was, of course, to drive out competitors. As to this, the Court said :

"This seems clearly to be within the prohibition of the Act; the case is analogous to that presented in *U. S. v. Eastern States Retail Lumber Dealers' Association*, 201 Fed. 581; 234 U. S. 600." (P. 973.)

Accordingly the Court decreed that an injunction should issue against the employment of fighting ships and that, as to the other prayers for relief, the suit should be dismissed.

It must be remembered that that case arose upon an application for an injunction. In such circumstances the Court was able to segregate the various elements of the scheme and, while enjoining such as rendered it illegal, to leave the defendants free in other respects to continue to trade as before. In an action for damages, such a segregation is not possible. The scheme must be considered as a whole. The element of fighting ships infects the whole scheme, because from that is to be inferred the intention of the Conference to drive competitors out of the trade. That alone makes the combination actionable and criminal. So does the provision as to rebates because, as is pointed out in the report of the Committee on Merchant Marine (*infra*) and that of the British Royal Commission (*infra*), the necessary consequence of the deferred rebate system is to drive rival shipping concerns out of the trade. The granting of rebates upon condition of patronizing the carrier exclusively was held unlawful as far back as *Menacho v. Ward*, 27 Fed. 529 (Southern District of New York, 1886). That was an application for an injunction to restrain the defendants from making discriminations against the complainants by charging them a higher rate

when they extended their patronage to rival carriers. The Court held the exaction illegal, saying:

"The proposition is speciously put that the carrier may reasonably discriminate between two classes of shippers, the regular and the casual; and that such is the only discrimination here. Undoubtedly the carrier may adopt a commutative system whereby those who furnish him a regular traffic may obtain reduced rates, just as he may properly regulate his charges upon the basis of the quantity of traffic which he receives from different classes of shippers. But this is not the proposition to be discussed. The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise to carry, but because they refuse to patronize the defendants exclusively. * * *

"The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. * * * If it is tolerated it will result practically in giving the defendants a monopoly of the carrying trade between these places. * * * Such discrimination is not only unreasonable, but is odious. Ordinarily the remedy against a carrier is at law for damages for a refusal to carry or to recover the excess of charges paid to obtain the delivery of goods. * * *

"The motion for an injunction is granted." (Pages 533, 534.)

The principles involved in the above cases were summed up accurately by Judge Hazel in his charge to the jury, as follows:

"There are different kinds of classes of monopolies or combinations in restraint of trade known to the law. We have the so-called trust, where the parties through arrangements suppress or destroy competition among themselves by assigning the shares of stock of

corporations to another or to a board of trustees who are authorized and empowered to conduct the business interstate without interference or competition from any of the parties or corporations forming the trust. and second, where the illegal combination consists of a pooling arrangement in which those who are parties to the combination agree to drive out of business their competitors in foreign or interstate trade or commerce so that they may practically have the field to themselves. Such contracts, as already indicated, are entirely against public policy, and are forbidden by the Anti-trust Act." (Page 157.)

POINT IV.

The Mogul S.S. decision is inapplicable to cases instituted under the Sherman Act.

Mogul Steamship Co. v. MacGregor, 23 Q. B. D. 598; A. C. (1892) 25, held that:

"No action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade." Per Bowen, L. J., 23 Q. B. D. 593, at page 619.

It was his opinion, as it was that of Fry, L. J., in the Court of Appeal, that the combination in question was in restraint of trade and unlawful, and would have been unenforceable between the parties. This view was concurred in by Lords Hannen and Bramwell in the House of Lords.

The Sherman Act, however, whether its authors contemplated it or not, made a great change. Contracts and combinations which before the Act were merely unenforceable as between the parties, became actionable and crimi-

nal. This necessarily resulted, because the definition of combinations was expressed in terms which embraced those which were unlawful but not actionable, such as the *Mogul* combination. The British authorities seem to agree that such a state of facts would, in the United States, be interpreted by the Courts as coming within the prohibition of the Sherman Act. [See the reports of the Members of the Royal Commission on Shipping Conferences in the Journal of the Society of Comparative Legislation (*infra*) and *Attorney General v. Adelaide S.S. Co.*, A. C. (1913.) 781 (*supra*.)]

The Courts of this country hold, concurring in the British view, that where a situation is governed by the Sherman Act the *Mogul* case is not applicable.

In *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, the Court said:

"The case of *Mogul S.S. Co. v. MacGregor*, 21 Q. B. D. 544, 23 Q. B. D. 598 (1892, App. Cas. 25), has been cited by the Courts below as holding in principle that contracts of this nature are valid at common law, * * * But, assuming that agreements of this nature are not void at common law, and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found in the terms of the statute under consideration." (Per Peckham, J., pages 334-335.)

So *United States v. Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271, at p. 286:

"The case of *Mogul Steamship Company v. McGregor, Gow & Co.* (1892), App. Cas. 25, has been cited to sustain the position of the defendants. It does not do so. It was a suit for damages, brought by a company engaged in the tea-carrying trade at Hankow, China, against six other companies engaged in the same trade, for loss inflicted by an alleged unlawful conspiracy entered into by them to drive the plaintiff out of the trade, and to obtain

control of the trade themselves. * * * It was held by the house of lords that this was not an unlawful and indictable conspiracy, giving rise to a cause of action by the person injured thereby; but it was not held that the contract of association entered into by the defendants was not void and unenforceable at common law. On the contrary, Lord Bramwell, in his judgment (at page 46), and Lord Hannen, in his (at page 58), distinctly say that the contract of association was void as in restraint of trade; but all the law lords were of opinion that contracts void as in restraint of trade were not unlawful in a criminal sense, and gave no right of action for damages to one injured thereby. The statute we are considering expressly gives such contracts a criminal and unlawful character. It is manifest, therefore, that whatever of relevancy the *Mogul Steamship Co. Case* has in this discussion makes for, rather than against, our conclusion."

And Wheeler-Stenzel Co. v. National Window Glass Association, 152 Fed. Rep. 864:

"Private actionable injury could not be predicated on such combinations in restraint of trade as were considered in *Mogul S. S. Co. v. Macgregor*, for the reason, as we have seen, that such agreements were not criminal or unlawful by the common law; but such combinations, so far as they affect interstate commerce, are both unlawful and criminal by the statute laws of the United States. It would seem, therefore, that the conclusion is obvious and unavoidable that the private right of action in the latter case must be commensurate with the extent of the illegality thus by law established." (Page 873.)

POINT V.

The combination was injurious to the public.

It is well known that in the business of ocean freight transportation a number of routes have during the last thirty years come under the control of Shipping Conferences. These are composed of ship owners of whom the predominant number seems to be British, the owners of ships other than British having been admitted to the Conferences when their competition made it necessary to include them. Inevitably these combinations caused serious loss to rivals who refused to enter the combinations, and it was not long before the conflict was brought to the attention of the courts. *Mogul Steamship Co. v. Macgregor*, A. C. (1892) 25, is, of course, the principal case. It was held that a ship owner who was driven out of the trade by a combination employing the deferred rebate and fighting ship method of suppressing its rivals had no cause of action. Being thus free to continue their practices the Conferences grew and multiplied and were extended to freight routes all over the world. Notwithstanding the immense extension of trade which accrued to British ship owners, the British Government, heeding, doubtless, the complaints of shippers and rival ship owners, and fearing that the uncontrolled power exercised by these combinations might in the end prove prejudicial to British trade, appointed a Royal Commission to investigate the whole subject. Right Honorable Arthur Cohen, K. C., was Chairman of the Commission, and reports were submitted by him and by Sir John Macdonell, also a member of the Commission. These are to be found in the *Journal of the Society of Comparative Legislation*, New Series, Volume X (1909), p. 144.

The reports appear to concern themselves rather with the existing state of the law on the subject than with the public policy of permitting the continuance of the practices investigated. From the absence of legislation on the subject it is to be presumed that Great Britain approves of such combinations. The Commission took occasion to examine the law of the other principal nations; that is, the United States, Germany, France and Russia. As to the law of the United States, it was thought that—

“A contract embodying a deferred rebate circular would probably be illegal under the Sherman Act.”
(P. 175.)

It was held that in England there could be no recovery of a rebate by a shipper. It is hardly necessary to point out that the interests of Great Britain in these matters by no means coincide with those of the United States. The former owns an overwhelming majority of the ships upon which the United States depends for its overseas trade.

These shipping combinations were exhaustively investigated for the United States by the House Committee on Merchant Marine. The testimony fills three volumes. The report was prepared by Professor Huebner and presents all the known facts and arguments on the subject. It was found

“That deferred rebate systems are objectionable and should be prohibited, for the following reasons:

1. By deferring the payment of the rebate until three or six months following the period to which the rebate applies, ship owners effectively tie the merchants to a group of lines for successive periods. In this connection it is argued that the ordinary contract system does not place the shipper in a position of continual dependence that results from the deferred rebate system.

2. That the system is unnecessary to secure excellence and regularity of service, a considerable number

of conferences being operated to-day without this feature."

(Report of Com. on Merchant Marine, 63rd Congress, Vol. IV., p. 307.)

The report continues:

"Many of the communications received from shippers make it clear that the writers regard the contentions of the conference line representatives as advantageous to shipper and ship owner if they are honestly and fairly carried out. but state that their experience has been to the effect that, once the combination of lines is established, it is apt to be used in an arbitrary and unfair way by favoring some large corporation or friend to the detriment of other shippers." (Page 308.)

In the course of the Committee's recommendations it stated that, while favoring Conferences and agreements which might be subject to Government control, it condemned those which existed.

"The Committee believes that the disadvantages and abuses connected with steamship agreements and Conferences as now conducted are inherent and can only be eliminated by effective Government control; and it is such control that the Committee recommends as the means of preserving to American exporters and importers the advantages enumerated and of preventing the abuses complained of." (Page 418.)

And among its recommendations is the following:

"6. That the use of 'fighting ships' and deferred rebates be prohibited in both the export and import trade of the United States." (Page 421.)

The legislation enacted this year carried out the recommendations of the Committee. Congress passed "An Act to establish a United States Shipping Board," etc. (No. 260, 64th Congress, approved September 7, 1916). Section 14 provided:

"First. No common carrier by water shall directly or indirectly, first, pay or allow, or enter into any

combination, agreement or understanding, express or implied, to pay or allow a deferred rebate to any shipper." (Then follows a definition of "deferred rebate.")

"Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term 'fighting ship' in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing or reducing competition by driving another carrier out of said trade."

Section 15 provides for the supervision by the Board of agreements between the carriers, the purpose of which is to regulate rates and sailings.

This statute, in so far as it defines unlawful combinations, is merely declaratory of the Sherman Act, which, itself, in terms applied to foreign commerce originating in this country (See Sec. 6).

The policy of the Anti-Trust legislation passed during this Administration, which was not to extend the boundaries of the Sherman Act, but to define them, is shown in the Addresses of the President to Congress, of which the following are extracts:

"I think it will be easily agreed that we should let the Sherman Anti-Trust Law stand unaltered, as it is, with its debatable ground about it, but that we should as much as possible reduce the area of that debatable ground by further and more explicit legislation; and should also supplement that great act by legislation which will not only clarify it, but also facilitate its administration and make it fairer to all concerned. . . . It is of capital importance that the business men of this country should be relieved of all uncertainties of law with regard to their enterprises and investments and a clear path indicated which they can travel without anxiety."

(From Annual Message of President to Congress, Dec. 2, 1913, Congress. Rec., 63rd Congress, 2nd Session, Vol. 51, Part 1, p. 75.)

"I ventured" (referring to the above message) "to reserve for discussion at a later date the subject of additional legislation regarding the very difficult and intricate matter of trusts and monopolies. . . .

"The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning of the existing anti-trust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is. Surely we are sufficiently familiar with the actual process and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain."

(From Address of President to Congress, Jan. 20, 1913, Congress. Rec., 63rd Congress, 2nd Session, Vol. 51, Part 2, pp. 1962-1963.)

POINT VI.

The amount of the rebates was recoverable.

The defendants are liable for the reason that they are common carriers. Exhibits A, B, C, and D attached to the complaint, pages 13 to 18, show the nature of the enterprise in which their ships were engaged. The defendants sent their circulars to the trade and invited general cargoes. This is admitted by Article 16 of the defendants' answers (pp. 24, 27, 30).

It was held in *The Lady Pike*, 21 Wall. 1:

"Carriers of merchandise by water, seeking general employment, are to be regarded as common carriers." (Page 14.)

And in *Liverpool Steamship Co. vs. Phoenix Insurance Co.*, 129 U. S. 397:

"By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only such two irresistible causes as the Act of God and Public Enemies." (Page 437.)

This relation imposed a special obligation upon the defendants not to exact an excessive rate for the carriage of merchandise. The shipper and carrier are not upon a footing of equality, because the shipper has to pay what the carrier demands or be left without means of transportation. At one period, as the evidence shows, the defendants' combination had driven rivals altogether out of business, and the shippers had no option at all in the matter. The plaintiff under these circumstances could invoke the principle, as old as our law, and restated in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426:

"Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on

the receipt of goods by a carrier, an exorbitant charge is stated and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge. 2 Kent Comm., 599, and note *a*; 2 Smith Lead. Cas., pt. 1, 8th ed., Hare & Wallace notes, p. 457."

In respect to the recovery of deferred rebates the law of the United States differs from that of England, as appears from the report of the Royal Commission on Shipping Rings above cited. Their views may be summed up in the memorandum by Mr. Cohen:

"Now it is, in my opinion, established law that the only cases in which a person who has paid money under an illegal contract can recover the money so paid are the following:

(1) When he has made the payment under a mistake of fact.

(2) Where he has made the payment under undue influence or has been induced by fraud to enter into the contract.

(3) Where payment has been made under an agreement which a statute has prohibited with a view of protecting those persons who may enter into such agreements. (See the judgment of Lord Justice Collins in the very recent case of *Harse v. Pearl Life Insurance Co.*, at p. 563, 1904, 1 K. B.)

In my opinion it is clear that the shipper under the rebate system does not fall within any of these three cases, and therefore, could not recover the rebate, even if the agreement under the rebate system was void and unlawful."

The third of Mr. Cohen's propositions aptly comprehends cases arising between shipper and carrier in the United States, where the former class has received protection at the hands of the Courts or Legislatures.

Sir J. MacDonnell's memorandum correctly states the

difference between the law of England and of the United States:

"There has been, as to carriers by sea, no legislation similar to that imposed upon carriers by land and upon railways. Carriers by sea may according to English law make what contracts they think fit with their customers. The contrary is, and long has been, the law of the United States,"

and he quotes from *Liverpool Steamship Co. v. Phoenix Insurance Co. (supra)*:

"The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgler or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper that the carrier presents; and in most cases he has no alternative but to do this or to abandon his business."

Some effort was made by the defendants to show that the rebate, to be returned in the event that the shipper forwarded his goods exclusively by the defendants' lines, was based upon an adequate consideration, consisting in the assurances, resulting therefrom, of regular shipments and full cargoes. If that was their only object the natural and obvious way of achieving it would have been to contract for regular periodical shipments. No one then could have disputed the lawfulness of a reduced rate as a consideration therefor. The deferred rebate, however, was that and something more. What its purpose was and what it involved must be inferred from its inevitable result, which was to drive all rival ships out of the South African trade.

This and other arguments advanced by the carriers to excuse the practice of offering deferred rates were convincingly disposed of by Judge Wallace in *Menacho v. Ward (supra)*, but it is unnecessary to pursue the discussion, because all these questions were decided by the jury adversely to the defendants.

POINT VII.**There were no errors committed in the rulings or the charge of the Circuit Judge.**

The errors upon which the defendants-in-error relied are stated on pages 21 and 22 of their principal brief.

Numbers 11, 12, 13 and 14 require no special notice, for they are general in their character. To establish them the defendants-in-error would have to make out that there was no testimony tending to sustain the verdict. (*Troxell v. Del., Lack. & W. Ry.*, 227 U. S. 484.)

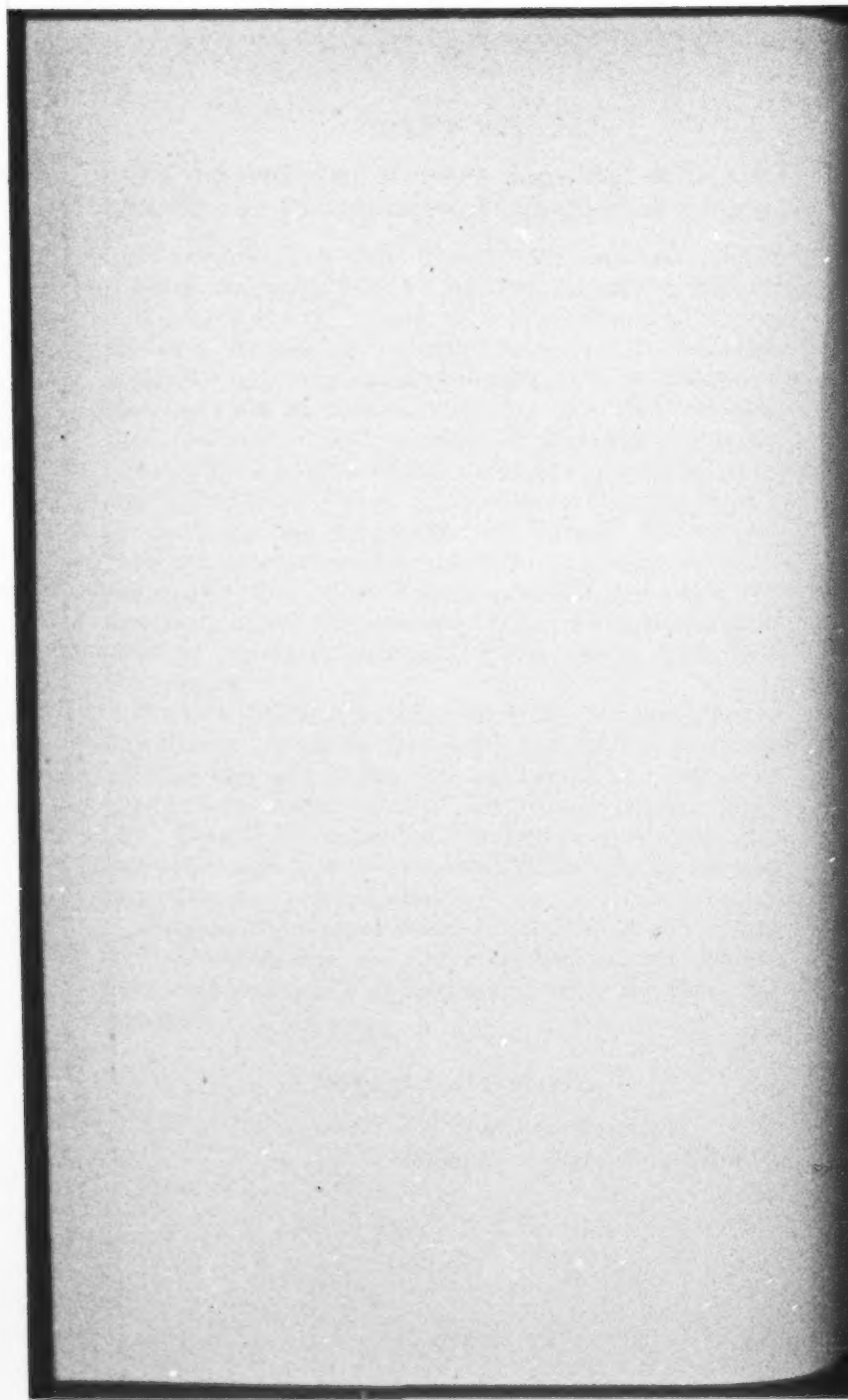
Assignment number 15 does not raise the question upon which the Circuit Court of Appeals decided the appeal, viz., whether the combination was illegal. It only presents the question whether the defendants were parties to the combination. (See Point I., *supra*.) As to this, the testimony of the circulars and of the agents, Barber and Norton, was uncontradicted. There was no issue here for the jury.

The instruction as to the liability of the agents Barber and Norton, of which defendants complain in the nineteenth assignment of error, is dealt with as a matter of law in the principal brief of the plaintiff-in-error (page 34). Even if the contention were well founded, the judgment of the District Court would still have to be affirmed as against the other defendants.

Assignments of error numbered 21, 22, 25 and 31 are unfounded, because the Judge charged all that defendants were entitled to in connection with the claim for damages.

Respectfully submitted,

A. LEO EVERETT,
Counsel for Plaintiff-in-Error.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 2.

HUGO ADELBERTO THOMSEN ET AL.,
PLAINTIFFS IN ERROR,

vs.

SIR CHARLES W. CAYSER ET AL.,
DEFENDANTS IN ERROR.

MEMORANDUM FOR PLAINTIFFS IN ERROR ON
MOTION TO DISMISS.

The cause is alive so long as the prolongation or extension of the term effected by means of the original writ of error continues. The effect of the writ of error is to enable a higher court to correct the decree below at any time while the right of review exists.

When there is a further right of review in the Supreme Court the cause is still held open so long as the writ is taken within the time prescribed by law. During all this time and up to the time of review and decision by the Supreme Court the cause is *in gremio magistratus*. The contention of the defendants in error is that when the Circuit Court of Ap-

peals issued its mandate to the Circuit Court and the Circuit Court entered its judgment thereon the cause was closed. But this does not take into consideration that there was still a right of review, which could be availed of in the Supreme Court. Otherwise the Circuit Court of Appeals could always avoid a review by the Supreme Court by issuing its mandate the instant that it decides an appeal. It is suggested by the defendants in error that this contingency could be avoided by taking a writ of error to the Circuit Court to review the judgment of dismissal entered upon the mandate, and, upon the Circuit Court of Appeals dismissing the writ of error, taking a writ of error to the Supreme Court from the order of dismissal. But it is clear from the very authorities cited by them that this second writ of error would not raise any question of the merits.

Merrill vs. Nat. Bank of Jacksonville, 78 Fed., 208.

It was decided there and in *Stewart vs. Salomon*, 97 U. S., 361, that it was the duty of the Circuit Court of Appeals to dismiss, as a matter of course, the writ of error so obtained. There would be no question open in this court, upon review of that order, except the propriety of the dismissal and it would have to be affirmed without discussion of the merits. When the *Merrill* case came to this court it was heard and decided on the *first* writ and this was affirmed, as was the judgment below of the Circuit Court based on the mandate on the first appeal. As has been shown, the *second* appeal taken then, had this court been disposed to reverse instead of affirm, would not have helped the plaintiff in error. It would have been necessary, irrespective of the merits, to affirm the order of the Circuit Court of Appeals dismissing the second writ.

It is evident, then, that in the case of an immediate issuance of a mandate by the Circuit Court of Appeals the party aggrieved would be remediless unless the jurisdiction of this court be held to include the power, not only of re-

versing the order of the Circuit Court of Appeals, but of compelling the recall of its mandate and the issuance of a new mandate in accordance with its opinion.

In re Metropolitan Trust Co., 218 U. S., 312, has no application to this situation. The complaint was dismissed as to the Trust Co. No attempt was made to review the judgment by writ of error. But at a subsequent term the court below attempted by virtue of its own control to set it aside. It was held, of course, that it was without power to do so.

But the argument of the defendants in error proves too much. If it is true that the power to correct a judgment is limited by the term of the lower court and not by that of the court of review, then the Circuit Court of Appeals had no power to recall its mandate and require a different judgment to be entered below, for it exercised it at a subsequent term of the circuit court. The first mandate was issued August 9, 1911. This took place in legal effect (as the court was in vacation) during the term which had just closed. But the recall of the mandate and the judgment entered upon it took place at the succeeding term, when, according to the theory of the defendants in error, the circuit court no longer had power to amend its decree. Consequently, if their argument be sound, the original order directing a new trial is still in force and unaffected by the subsequent judgment of dismissal, which is null and void. This result would be quite satisfactory to the plaintiffs in error, but it is not the true solution. The correct theory would appear to be that while there are valid writs of error pending, the entire cause is held in suspension until the determination upon the last writ.

Respectfully submitted,

A. LEO EVERETT,

Of Counsel.

January 22, 1917.

THOMSEN ET AL., COMPOSING THE FIRM OF
THOMSEN & COMPANY, v. CAYSER ET AL.,
COMPOSING THE FIRM OF CAYSER, IRVINE &
COMPANY, ET AL.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT.

No. 2. Argued April 28, 20, 1914; restored to docket for reargument
June 21, 1915; reargued January 19, 22, 1917.—Decided March 6, 1917.

For review in this court of a final judgment of the Circuit Court of Appeals directing that an action be dismissed, the writ of error should go to that court; and its efficacy is not impaired by the circumstances that, before allowance of the writ by that court, the trial court, obeying the mandate, has entered judgment of dismissal and has adjourned for the term before any application has been made to recall its action.

When parties in the Circuit Court of Appeals, desiring to shorten the litigation by bringing the merits directly to this court, consent that a final judgment may be made against them in lieu of one remanding the cause for a re-trial, the consent is not a waiver of errors relied on, and a final judgment entered as requested is reviewable here.

Foreign owners of steamship lines, common carriers between New York and ports in South Africa, formed a combination, or "conference," to end competition among themselves and suppress it from without. They adopted uniform net tariff rates, and, for the purpose of constraining shippers to use their ships and avoid others, exacted deposits ("primage") of ten per cent. of and in addition to the net freight charges, to be repaid as rebates or "commissions" in each case upon the lapse of a period of many months, but then

only if the shipper, up to the date set for repayment, had used the vessels of the coalition to the exclusion of all competitors. In respect of particular consignments the shipper's right to the refund was made similarly dependent on the "loyalty" of his consignee to vessels of the combination. The hold thus gained on shippers, through the accumulation of their deposits, enabled the coalition to maintain its tariff and custom, in general, while cutting rates with competitors in particular cases by means of "fighting ships." Several important rivals were gathered into the combination from time to time, and a virtual monopoly was effected. *Held*, that the combination violated the Sherman Act.

Common carriers are under a duty to compete, and are subject in a peculiar degree to the policy of the Sherman Act.

A combination is not excusable upon the ground that it was induced by good motives and produced good results.

The conduct of property embarked in the public service is subject to the policies of the law.

The fact that the participants might have withheld the commercial service they rendered, i. e., stayed out of the business, can not justify an unlawful combination.

A combination affecting the foreign commerce of this country and put in operation here, is within the act although formed abroad; and

Those who actively participate in managing the affairs of the combination in this country are liable under § 7 although they are not the principals.

When more than a reasonable rate is exacted as a result of an unlawful combination, the excess over what was reasonable affords a basis for the damages recoverable under § 7, and whether, and to what extent, such rate was unreasonable are questions determinable by the jury, on proper evidence and instructions.

When claims for damages for loss of custom are definitely stated, a charge advising the jury that the burden of proof is on the plaintiff, that they must not allow speculative damages, and that they are not required to guess at amounts but should be able to calculate them from the evidence, sufficiently guards against the danger of supposititious profits being considered as an element of the verdict.

Semble, that a general verdict for an amount which equals a particular claim of damages and interest may be assumed to have been responsive to that claim alone, although there were others which were submitted to the jury.

Failure to give an instruction upon the burden of proving rates un-

reasonable, *held*, at most a harmless error, in view of a painstaking trial and careful instructions upon the estimation of damages. The trial court in its sound discretion may allow a new cause of action to be set up by amendment of the complaint. 190 Fed. Rep. 536, reversed.

Action, brought in the Circuit Court of the United States for the Southern District of New York, by plaintiffs in error against defendants in error and others under the Sherman Act to recover damages for injuries sustained as the result of a combination in restraint of foreign trade.

The defendants, it is charged, being common carriers between New York and South African ports, did, under certain company names, sometime prior to December, 1898, enter into a combination and conspiracy in restraint of trade and commerce between New York and ports in South Africa to be rendered effective by making certain discriminations in rates of freight to be charged which were calculated to coerce and prevent plaintiffs and other shippers and merchants similarly situated from employing such agencies and facilities of transportation as might be afforded them by other common carriers.

For such purpose they united under the name of "The South African Steam Lines" and distributed a circular ¹

¹ "THE SOUTH AFRICAN STEAM LINES.

"Notice to Shippers in the United States.

"Commission in Respect of Shipments by Steam and Sailing Vessels.

"London, 31st December, 1898.

"1. Shippers to all Ports of the Cape Colony and of Natal, and to Delagoa Bay, are hereby informed that until further notice, and subject to the conditions and terms set out herein each of the under-named Lines will pay Shippers by their Line a commission of ten per cent., calculated upon the net amount of freight at tariff rates received by such Line from such Shippers on their shipments from the United States to South Africa.

"2. The said Commission to be computed every six months up to the 31st January and 31st July in each year, and to be payable nine months after such respective dates to those shippers only who, until

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(Exhibit A) promising to pay shippers by their lines 10% upon the net amount of freight at tariff rates received on shipments from the United States to Africa, the commission to be computed every six months up to the thirty-first of January and the thirty-first of July in each year and to be payable nine months after such respective dates, but only to shippers who shipped exclusively by their lines to certain African ports, and provided that the shippers directly or indirectly have not made or have not been interested in any shipments by other vessels.

The commission is not payable on the goods of any consignee who directly or indirectly imports goods by vessels other than those dispatched by the combining lines.

These terms, it is charged, are against public policy and in restraint of trade.

About the middle of the year 1901 the defendant Deutsche Dampschiffahrts Gesellschaft, Hansa, and the firm of Funch, Edye & Co., as its agent, offered to trans-

the date at which the Commission shall become payable shall have shipped exclusively by vessels despatched by the undernamed Lines respectively from the United States to Ports of the Cape Colony, Natal, and Delagoa Bay, provided that such shippers, either as Principals or as Agents, have not directly or indirectly made or been interested in any shipments to any of the aforesaid Ports by vessels other than those despatched by the under-named, and also provided that the Statement of Claim for such commission shall be made in the annexed form, within twelve months of the date of shipment, to the Line which shall have carried the goods in respect of which the Commission is claimed.

"3. The above commission is not payable on the goods of any Consignee who directly or indirectly imports goods by vessels other than those despatched by the under-named Lines.

"(Subscribed) AMERICAN & AFRICAN STEAMSHIP LINE.
UNION-CLAN LINE.

"All previous notices to Shippers or Consignees with reference to returns on Freight are cancelled.

"Note.—The above Commission will be payable to the Shippers whose names appear on the Bills of Lading or to their Order."

port merchandise to South African ports at reasonable rates and lower than those imposed by the other defendants. Thereupon the other defendants, for the purpose of avoiding the competition of those carriers, accepted them into the scheme and combination and there was agreement between them to continue the monopoly, and another circular was issued like the first, including only the additional announcement that the Deutsche Dampschiffahrts Gesellschaft, Hansa, had been added as one of the parties to the first-named agreement. The circular is attached to the complaint as Exhibit B.

Subsequently the defendants adopted a verbal agreement that altered the circulars to the effect that the so-called "loyal" consignees could collect the so-called rebates regardless of whether the shippers were also loyal; but on the condition that where the shippers and consignees were both loyal the rebates would be paid to the shippers, while if the consignee alone were loyal the rebate would be paid by the defendants in London direct to the so-called loyal consignee.

Defendants have not dispatched steamers to African ports at stated and regular dates but have placed steamers on berth to receive general cargo only at such times and for such ports in South Africa as they deemed best for their private gain and profit.

By reason of the monopoly so created by defendants, shippers—among whom are plaintiffs—have been compelled to submit to hardships and inconvenience, and to pay unreasonable and higher rates to such extent as to leave at the present time in the possession of defendants collectively, as plaintiffs are informed, about one and one-half million dollars representing the extortion of their rates, and that of such amount £1,112, 7s. 11d. has been extorted from plaintiffs.

Two steamship companies, the Prince Line and the Houston Line, have since the spring of 1902 offered to

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carry from the United States to South African ports merchandise for a reasonable and remunerative rate lower than that exacted by defendants.

Defendants, to prevent such steamers from competing, have, in addition to the terms imposed on the South African trade by the circulars above mentioned, imposed further conditions which, while they ostensibly reduced the lower rate of freight and announced that defendants would pay the greater difference arising therefrom, by them called a special commission, they still exacted the payment of the higher rates, by them called tariff rates, at the time of shipment and imposed the following further conditions: (1) Precedent to the payment of such difference they require all shippers to be loyal to them. (2) Each shipper to disclose the name of his consignee. (3) The difference in rates to be computed only on those steamers which would come into direct competition with the steamers of either the Prince Line or the Houston Line, called by defendants "fighting steamers." (4) The special commission or rebate to be granted only on limited amounts of freight room, to be allotted at the will and discretion of defendants, additional freight room to be paid for at the higher rate under the conditions expressed in the circulars.

These additional conditions are intended to further restrain trade and in fact have prevented shippers who had already shipped goods under the original conditions imposed by the circulars from further exporting as much merchandise to South African ports at reasonable rates offered other shippers.

To further secure the monopoly of the carrying trade to such ports and oust competition defendants have threatened to withhold and have withheld by way of forfeit the repayment of the so-called rebates from all those, among whom are plaintiffs, so-called by them "loyal shippers" and "loyal consignees," as aforesaid,

"who would not continue to remain loyal under the additional conditions superimposed as aforesaid."

For illustration plaintiffs adduce two instances when they were obliged to pay higher rates on a portion of the shipments, which rates were higher than those offered by the opposition lines, and defendants threatened, if plaintiffs made the shipments over the latter lines upon the more favorable terms, to withhold from repaying plaintiffs all sums previously so compulsorily paid by plaintiffs.

Plaintiffs are informed and believe that since the opposition lines have offered to carry freight to South African ports defendants have, by reason of their conspiracy, refused to allot uniform and proportionate freight room on their steamers and have arbitrarily discriminated between several shippers and even against the so-called "loyal" shippers and consignees, with the unlawful intent that the moneys so held by them would be sufficient security to prevent such shippers or consignees from making shipments of or importing their goods by the competing vessels.

By reason of the conspiracy plaintiff and others similarly situated have been compelled either not to ship at all and to lose a great deal of their trade or to ship on defendants' steamers a small portion of merchandise at the lower rates and the remainder, of the same class and even of the identical lot of merchandise, at the higher rates, which is practically prohibitive of any trade whatever by reason of the fact that the substantial difference between the two rates would be a discrimination against the various consignees and customers of plaintiffs and the various shippers and customers of other shippers by the same steamer.

The conspiracy violates the laws of the United States and especially the Act of July 2, 1890, entitled "An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies."

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Plaintiffs allege damages in the sum of £1,112, 7s. 11d., equal to \$5,560, for which they pray as the excess over a reasonable rate, and the further sum of \$10,000 damages, and the trebling of these sums.

The defendants, by their company names, filed separate answers in which they deny some of the allegations of the complaint and admit others. They deny conspiracy and combination for the purpose or with the effect set out in the complaint. They admit the making and issuing of the circulars designated A and B in the complaint, but deny that they have the effect or were intended to have the effect ascribed to them.

They admit the refusal to pay plaintiffs certain claims as rebates, but deny the distinction between loyal shippers and loyal consignees and all of the inferences and assertions in regard thereto.

As a separate defense they allege that all freight carried by them for plaintiffs was carried on bills of lading, each of which contained on its face the statement of the amount of freight to be paid and in respect to which in every instance plaintiffs either paid the freight or agreed to pay the amount of freight stated in the bill of lading and in each instance gave a due bill which was subsequently paid; that the payments were made freely and voluntarily and without protest; and that so far as any of the payments were made pursuant or with reference to the printed circulars plaintiffs coöperated knowingly in such transactions and cannot now be entitled to any relief on account of payments of freight made thereunder.

It was prayed that the complaint be dismissed.

Upon the issues thus formed there were two trials. At the conclusion of the testimony on the first trial the court considered that no cause of action was established under the Sherman Law and upon motion of defendants dismissed the complaint. 149 Fed. Rep. 933.

The judgment was reversed by the Circuit Court of Appeals (October, 1908). 166 Fed. Rep. 251.

Upon the return of the case to the Circuit Court it was tried to a jury, resulting in a verdict for plaintiffs against the defendants composing the firms of Cayser, Irvine & Company; Barber & Company; and Norton & Son, the action as to the other defendants having abated or been dismissed by the court.

The judgment recites that the action was brought under the Act of Congress of July 2, 1890, and that a verdict had been rendered against the defendants above named for the sum of \$5,600, with interest in the sum of \$1,973.06, in all \$7,573.06; that thereupon the court directed the clerk to treble the amount of the verdict pursuant to the terms of the act of Congress, making the amount \$22,719.18, and that, the parties consenting, the court fixed \$2,500 as an attorney's fee. The judgment was reversed by the Circuit Court of Appeals, one member dissenting (July, 1911). 190 Fed. Rep. 536.

The Circuit Court at the first trial (Judge Hough sitting) was of opinion that the testimony did not establish that the combination charged against defendants was in unreasonable restraint of trade. The Circuit Court of Appeals expressed a different opinion. The court said that the substance of the complaint was that defendants were engaged as carriers in South African trade and had entered into a combination in restraint of foreign trade and commerce in violation of the act of Congress by means of a scheme under which they united as "The South African Lines," fixed rates, and shut off outside competition by requiring shippers to pay a percentage in addition to a reasonable freight rate, which they should receive back in case—and only in case—they refrained from shipping by other lines. And the court said the evidence showed the existence of a "conference" for the purpose of fixing and maintaining rates and a return "commission" to "loyal"

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shippers. The manifest purpose of the combination and its effect were, it was further said, to restrain competition and that it was therefore in contravention of the Federal Anti-Trust Act.

The court considered that whether the restraint was reasonable or unreasonable was immaterial under the decisions of this court, or whether the combination was entered into before or after plaintiffs commenced business, the statute applying to continuing combinations, or whether the combination was formed in a foreign country, as it affected the foreign commerce of this country and was put into operation here. And as the plaintiffs had alleged damage, the court decided that they were entitled to an opportunity to prove it and remanded the case to the Circuit Court.

Upon the second appeal the court declared a change of view, saying: "When this case was in this court before we said, upon the authority of the decisions of the Supreme Court as we then interpreted them, that whether the restraint of trade imposed by the combination in question was reasonable or unreasonable was immaterial," and that it was "also apparent from the record that the Circuit Court upon the second trial in holding as a matter of law that the combination shown was in violation of the statute, acted upon the same view of the law." And further: "In the light of the recent decisions of the Supreme Court in the Standard Oil and Tobacco Cases, the construction so placed upon the statute by this court and the Circuit Court must be regarded as erroneous and a new trial must be granted unless the contentions of the parties are correct that, upon the facts shown, this court can now determine the legality of the combination."

The court then said that it was impossible to hold that the record disclosed a combination in unreasonable restraint of trade, but that it would be unduly prejudicial to plaintiffs to reverse the judgment with instructions to

dismiss; that as the plaintiffs had presented their case in view of the decision of the court that the reasonableness of the restraint was immaterial, it would be unjust to them to dismiss the complaint because their proof did not conform to another standard, and that upon another trial the plaintiffs might be able to "produce additional testimony tending to make out a case within the Supreme Court decisions referred to." Accordingly, the court remanded the case for a new trial.

Subsequently a rehearing was granted on petition of plaintiffs, who waived any right to a new trial and consented that the case should be disposed of one way or the other. As a result of the rehearing the mandate was recalled and the judgment reversed with instructions to enter an order dismissing the complaint.

This writ of error was then allowed.

Mr. A. Leo Everett and Mr. Lorenzo Ullo for plaintiffs in error:

Shippers are peculiarly at a disadvantage and carriers are forbidden to subject them to unreasonable conditions. *Lockwood v. New York Central R. R. Co.*, 17 Wall. 357; *Menacho v. Ward*, 27 Fed. Rep. 259. The maxim *volenti non fit injuria* therefore does not apply. The ten per cent. payments were made under duress. *Swift Company v. United States*, 111 U. S. 22. The parties were not *in pari delicto*. *Duval v. Wellman*, 124 N. Y. 156; *Interstate Commerce Commission v. Texas & Pacific R. R.*, 52 Fed. Rep. 187; *Loder v. Jayne*, 142 Fed. Rep. 1015. Tender of goods and protest by plaintiffs, and refusal to carry by defendants were unnecessary.

Unreasonable or coercive rates of freight are recoverable. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Herserman v. Burlington, Cedar Rapids & Northern Ry. Co.*, 63 Iowa, 732; *Parker v. Great Western R. R. Co.*, 7 M. & G. 253.

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All parties to the unlawful combination are liable *in solido*. *Atlanta v. Chattanooga Foundry*, 127 Fed. Rep. 23; *Interstate Commerce Commission v. Texas & Pacific R. R.*, *supra*; *Loder v. Jayne*, *supra*.

Agents of principals are equally responsible *in solido* with all parties to the illegal combination. See *Leonard v. Pool*, 114 N. Y. 371.

The jury found that the ten per cent. exaction was an unreasonable and coercive rate. There is no doubt that the verdict was for the amount so exacted and paid, and not for other items of damage which plaintiffs had claimed. This establishes in itself that the effect of the combination was unreasonable. Noncompetitive rates are presumably unreasonable, especially where the lack of competition is the achievement of the party fixing the rate. *China and Japan Trading Co. v. Georgia R. R.*, 12 I. C. C. 241; Taft, J., as quoted with approval in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 237; *Menacho v. Ward*, *supra*.

That the Anti-trust Act was violated is plain under *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 106; and *Nash v. United States*, 229 U. S. 373. The court's reasoning in the first of these cases is directed to the question whether the acts complained of, and claimed to have benefited the trade, were reasonably to be held in restraint of trade; whether they were within the condemnation of the statute, reasonably construed, considering the contracts or agreements, their necessary effect, and the character of the parties by whom they were made. But a "reasonable construction" of the statute is far different from an examination into the reasonableness of the restraint. The examination into the reasonableness of the cause of the restraint is what calls for a reasonable construction of the statute. When by a reasonable construction of the statute, the acts complained of are found to cause actually

or potentially a restraint of trade within the meaning of the prohibition, a further inquiry as to the reasonableness of its effect is immaterial.

This combination is not an "aggregation of capital" necessary for the development of trade; nor is it a unification of interests to cheapen freight rates or general expenses, but it is avowedly a combination to suppress competition among the constituents and keep away outside competition, by coercive means. It is prejudicial to the public interest of the United States. *Nash v. United States*, *supra*; *United States v. Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87.

The doctrine of *Mogul Steamship Line v. McGregor*, 31 L. R. 554 (1888); 23 L. R. 598 (1889); 17 App. Cases, 25 (1891), was not approved by this court in the *Standard Oil Case*; it was based on the British legislative policy of the time, and differs from the earlier common law as inherited in this country and federalized by the Sherman Act. *Hooker v. Van DeWater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Atchison v. Mallon*, 43 N. Y. 147; *Elmira Coal Co. Case*, 68 N. Y. 558; *People v. Sheldon*, 139 N. Y. 251; *Lough v. Outeridge*, 143 N. Y. 271. The *Mogul Case* also involved a different scheme and a different cause of action.

Under the Sherman Act, contracts and combinations which before the act were merely unenforceable as between the parties, became actionable and criminal. This necessarily resulted, because the definition of combinations was expressed in terms which embraced those which were unlawful but not actionable, such as the *Mogul* combination. The British authorities seem to agree that such a state of facts would, in the United States, be interpreted as coming within the prohibition of the Sherman Act. See the reports of the Members of the Royal Commission on Shipping Conferences in the Journal of the Society of Comparative Legislation, New Series,

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vol. X (1909), p. 144, and *Attorney General v. Adelaide Steamship Co.*, A. C. (1913), 781.

The courts of this country hold, concurring in the British view, that where a situation is governed by the Sherman Act the *Mogul Case* is not applicable. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290; *United States v. Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271, 286; *Wheeler-Stenzel Co. v. National Window Glass Association*, 152 Fed. Rep. 864, 873.

On the evils of the "conferences" and deferred rebate system, as practiced by British shipowners, and their use of "fighting ships," see Report of Committee on Merchant Marine, 63d Cong., vol. IV, p. 307. The policy of this country is recently and specifically expressed by the Shipping Board Act of September 7, 1916, 39 Stat. 728.

Mr. Thomas Thacher and Mr. J. Parker Kirlin, with whom *Mr. Charles R. Hickox* was on the briefs, for defendants in error:

Restraint of competition is restraint of trade only when unfavorable to trade or commerce, and therefore unreasonable and prejudicial to the public interests. *United States v. Hamburg-American S. S. Line*, 216 Fed. Rep. 971; *United States v. Prince Line* and *United States v. American-Asiatic S. S. Co.*, 220 Fed. Rep. 230; *United States v. United States Steel Co.*, 223 Fed. Rep. 55; *Patterson v. United States*, 222 Fed. Rep. 599; *United States v. United Shoe Machinery Co.*, 222 Fed. Rep. 349; *United States v. International Harvester Co.*, 214 Fed. Rep. 987; *United States v. Keystone Watch Case Co.*, 218 Fed. Rep. 502. This is the view taken in the *Powder Trust Case*, 188 Fed. Rep. 339, 373. Such is the doctrine of this court. *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 106; *United States v. Joint Traffic Association*, 171 U. S. 505.

The history of the Sherman Act shows a clear intent

on the part of Congress not to condemn contracts and combinations merely because they are in restraint of competition or merely because they operate to raise the cost of commodities to consumers. See also its title: "To protect trade and commerce." It looked to the development and increase of trade and commerce in the interest of the public, to the removal of obstacles to its growth and expansion. The combination must prejudice the public interests either by unduly restricting competition or by unduly obstructing the course of trade. *Standard Oil and Tobacco Cases*, *supra*; *Nash v. United States*, 229 U. S. 373, 376; *United States v. Terminal R. R. Association of St. Louis*, 224 U. S. 383; 236 U. S. 194; *United States v. Union Pacific R. R. Co.*, 226 U. S. 61; *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600, 609, 610.

Restriction of competition by the union of competing carriers, or an obstruction of the course of trade, is not undue, unless the result is to injure the public, by decreasing the facilities open to the public for trade or commerce, leading to a diminution of exchange of commodities or less favorable conditions for the development of trade or commerce. The emphasis is now put by the decisions of this court upon the words "undue" and "unreasonable," and these words are used with relation to the public interest. That which is the ultimate concern in the constitutional grant of power over commerce, and in the exercise of such power by the Anti-trust Act, is the exchange and distribution of commodities.

This was recognized by Mr. Justice Peckham in the *Joint Traffic Association Case*, 171 U. S. 505. The paramount interest of the public is in the efficiency of the service to the public in transporting freight and passengers in aid of commercial intercourse.

This is recognized in the *St. Louis Terminal Association Case*, 224 U. S. 383, 394, and in the *Union Pacific Case*,

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226 U. S. 61, 88. See *Attorney General v. Adelaide Steamship Co.*, A. C. (1913) 781.

The question arising in this case becomes substantially the same as that which arose in the *Mogul Steamship Company Case*, A. C. (1892), 25, although the courts there dealt not with any statute, but with the common law. *Mogul Steamship Company Case*, 21 Q. B. D. 544, 548. See also *North-Western Salt Co. v. Electrolytic Alkali Co.*, 30 Law Times Rep. 313.

That to do business on the rebate or commission plan is not to monopolize or attempt to monopolize, see *In re Corning*, 51 Fed. Rep. 205; *In re Terrell*, 51 Fed. Rep. 213; *In re Greene*, 52 Fed. Rep. 104; *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep. 454.

The burden was on the plaintiffs to prove an unlawful combination. It was error for the trial court to assume that an unlawful combination had been established as matter of law.

The principals were not shown to have combined as alleged; the evidence established the contrary. Neither did it appear, by undisputed evidence, as it must to justify the court's action, that the defendants (mere agents) were parties to the assumed combination. They had nothing to do with making any combination (whatever was done in that respect was done abroad), and nothing to do with the business except to carry out instructions from their London principals.

The assumed combination could not have been illegal under the act because it was formed, if formed anywhere, beyond the jurisdiction of the United States. For this proposition we need only refer to *American Banana Co. v. United Fruit Co.*, 213 U. S. 347. If a partnership or corporation had been formed to own and operate the ships belonging to the original shipowners, there would seem to be no room for doubt that its legality would not be affected by the Sherman Act. If, so uniting their

properties and business, these shipowners had done business here in substantially the mode in which they are alleged to have done it, there could be no charge of an illegal combination or conspiracy under our law.

The proof showed that commerce was actually promoted.

There was no proof that plaintiffs were injured. This was essential to a cause of action under § 7 of the act.

The Circuit Court erred in declining to charge the jury that the burden was on the plaintiffs to show that the rates were unreasonable; in not leaving the question of combination to the jury; in permitting the jury to consider supposititious profits that the plaintiffs claimed they would have made if they had followed a different course; and in permitting the plaintiffs during the trial to amend their complaint so as to set up a new cause of action.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

A motion to dismiss the writ of error is made, two grounds being urged: (1) The Circuit Court of Appeals was without jurisdiction to allow the writ on March 15, 1912, for the reason that its judgment had become executed and the judgment entered thereon in the Circuit Court November 24, 1911, had become final and irrevocable before the petition for the writ was filed and the order allowed. (2) The judgment of the Circuit Court was entered in the form finally adopted at the request of plaintiffs and by their consent, and the errors assigned by plaintiffs were waived by such request and consent.

The argument to support the motion is somewhat roundabout. It gets back to the Circuit Court and charges that because that court had entered judgment on the original mandate and had adjourned for the term without any application having been made to recall that

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judgment and because no writ of error to review it was sought, the judgment became a final disposition of the case.

We are not concerned with what the Circuit Court might have done, but only with what the Circuit Court of Appeals did and the jurisdiction it possessed. It received and granted a petition for rehearing, ordered a recall of the mandate previously issued, set aside the judgment of the Circuit Court, and remanded the case with directions to dismiss the complaint. The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay.

Subsequently a petition for the writ of error was filed and allowed and all further proceedings upon the part of the defendants for the enforcement of the judgment were suspended and stayed until the final determination by this court upon the writ of error, in return to which the record was properly furnished. *Atherton v. Fowler*, 91 U. S. 143.

The motion to dismiss is denied.

The case in the courts below had a various fate, victory alternating between the parties but finally resting with defendants.

The plaintiffs, dissatisfied, have brought the case here. We are confronted at the outset, in view of the proceedings in the courts below, with contentions as to what questions of law or fact are before us.

Notwithstanding two trials and two appeals and reviews in the Circuit Court of Appeals, defendants insist the facts are yet in controversy. We cannot assent.

It will be observed from the excerpts from the opinions of the Circuit Court of Appeals that the case was decided upon the proposition of law that the combination charged against defendants was not in unreasonable restraint of

trade and that such character was necessary to make it illegal under the Federal Anti-trust Act. As to the fact of combination and restraint and the means employed both trial and appellate courts concurred, and their conclusion is not shown to be erroneous.

There is a contention that "there is not in the record any direct proof whatever of the terms of any conference or agreement participated in by any of the defendants. All that appears is that certain steamship owners consisting of firms, the identity of whose members is not established, operated steamers in the trade from New York to South African ports without competing with one another." But more than that appears, and it cannot be assumed that the circulars that were issued and the concerted course of dealing under them were the accidents of particular occasions having no premeditation or subsequent unity in execution. The contention did not prevail with the courts below and we are brought to the consideration of the grounds upon which the Circuit Court of Appeals changed its ruling, that is, that it was constrained to do so by the *Standard Oil and Tobacco Cases*, 221 U. S. 1, 106.

It is not contended that the facts of those cases or their decision constrained such conclusion, but only that they announced a rule which, when applied to the case at bar, demonstrated the inoffensive character of the combination of defendants. In other words, it is contended that it was decided in those cases that "the rule of reason" must be applied in every case "for the purpose of determining whether the subject before the court was within the statute," to quote the words of the opinion, and, as explained in subsequent cases, it is the effect of the rule that only such contracts and combinations are within the act as, by reason of their intent or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting competition or unduly obstructing the

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course of trade. *Nash v. United States*, 229 U. S. 373, 376; *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600, 609.

But the cited cases did not overrule prior cases. Indeed, they declare that prior cases, aside from certain expressions in two of them¹ or asserted implications from them, were examples of the rule and show its thorough adequacy to prevent evasions of the policy of the law "by resort to any disguise or subterfuge of form" or the escape of its prohibitions "by any indirection." And we have since declared that it cannot "be evaded by good motives," the law being "its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties and, it may be, of some good results." *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49; *International Harvester Co. v. Missouri*, 234 U. S. 199.

The rule condemns the combination of defendants, indeed, must have a stricter application to it than to the combinations passed on in the cited cases. The defendants were common carriers and it was their duty to compete, not combine; and their duty takes from them palliation, subjects them in a special sense to the policy of the law.

Their plan of evasion was simple and as effective as simple. They established a uniform freight rate, including in it what they called a primage charge. This charge was refunded subsequently, but only to shippers who shipped exclusively by the lines of the combining companies and who had not directly or indirectly made or been interested in any shipment by other vessels. And there was the further condition that the rebate was not

¹ *United States v. Trans-Missouri Freight Association*, 166 U. S. 290; *United States v. Joint Traffic Association*, 171 U. S. 505.

payable on the goods of any consignee who directly or indirectly imported goods by vessels other than those of the "conference"—to use the word employed by the witnesses to describe the combining companies. This loyalty on the part of the consignees was subsequently not exacted, but loyalty upon the part of shippers was continued to be required and its reward was the refunding of the primage charge. That the combination was effective both the lower courts agreed. Upon its extent they differed, the Court of Appeals considering that while it was in restraint of trade the restraint was reasonable and therefore not obnoxious to the law.

The Court of Appeals has not given us its reason for its conclusion. Counsel for defendants say that the *Standard Oil* and *Tobacco Cases* furnish the explanation, and that they support what the history of the act establishes, that it was the "clear intent upon the part of Congress not to condemn contracts and combinations merely because they are in restraint of competition or merely because they operate to raise the cost of commodities to consumers."

The argument that is employed to sustain the contention is one that has been addressed to this court in all of the cases and we may omit an extended consideration of it. It terminates, as it has always terminated, in the assertion that the particular combination involved promoted trade, did not restrain it, and that it was a beneficial and not a detrimental agency of commerce.

We have already seen that a combination is not excused because it was induced by good motives or produced good results, and yet such is the justification of defendants. They assert first that they are voluntary agencies of commerce, free to go where they will, not compelled to run from New York to Africa, and that, "unlike railroads, neither law, nor any other necessity, fixes them upon particular courses;" and therefore, it is asked, "who can say that otherwise than under the plan adopted, any of

the ships of the defendants would have supplied facilities for transportation of commodities between New York and South Africa during the time referred to in the complaint?" The resultant good of the plan, it is said, was "regularity of service, with steadiness of rates"; and that "the whole purpose of the plan under which the defendants acted was to achieve this result."

We may answer the conjectures of the argument by the counter one that if defendants had not entered the trade others might have done so and been willing to serve shippers without constraining them, been willing to compete against others for the patronage of the trade. And it appears from the testimony that certain lines so competed until they were taken into the defendants' combination.

Nor can it be said that under defendants as competitors or that under competing lines service would not be regular or rates certain, or, if uncertain, that they would be detrimentally so.

That the combination was intended to prevent the competition of the lines which formed it is testified, and it cannot be justified by the conjectures offered by counsel; nor can we say that the success of the trade required a constraint upon shippers or the employment of "fighting ships" to kill off competing vessels which, tempted by the profits of the trade, used the free and unfixed courses of the seas, to paraphrase the language of counsel, to break in upon defendants' monopoly. And monopoly it was; shippers constrained by their necessities, competitors kept off by the "fighting ships." And it finds no justification in the fact that defendants' "contributions to trade and commerce" might "have been withheld." This can be said of any of the enterprises of capital and has been urged before to exempt them from regulation even when engaged in business which is of public concern. The contention has long since been worn out and it is established that the

conduct of property embarked in the public service is subject to the policies of the law.

It is contended that the combination, if there was one, was formed in a foreign country and that, therefore, it was not within the act of Congress; and that, besides, the principals in the combination and not their agents were amenable to the law. To this we do not assent. As was said by the Circuit Court of Appeals, the combination affected the foreign commerce of this country and was put into operation here. *United States v. Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87. It, therefore, is within the law, and its managers here were more than simply agents—they were participants in the combination.

It is, however, contended that even if it be assumed the facts show an illegal combination, they do not show injury to the plaintiffs by reason thereof. The contention is untenable. Section 7 of the act gives a cause of action to any person injured in his person or property by reason of anything forbidden by the act and the right to recover threefold the damages by him sustained. The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 436. The unreasonableness of the rate and to what extent unreasonable was submitted to the jury and the verdict represented their conclusion.

The next contention is that the fact of combination should have been submitted to the jury and not decided as a matter of law by the court. We are unable to assent. There was no conflict in the evidence, nothing, therefore, for the jury to pass upon; and the court properly assumed the decision of what was done and its illegal effect.

It is next contended that the jury was permitted to consider as elements of damage supposititious profits. The

record does not sustain the contention. The profits were not left to speculation. There were different sums stated, resulting from the loss of particular customers, and the fact of their certainty was submitted to the judgment of the jury. They were told that they "ought not to allow any speculative damages," that they were not "required to guess" as to what damages "plaintiffs claim to have sustained." And, further, that the burden of proof was upon plaintiffs and that from the evidence the jury should be able to make a calculation of what the damages were. Besides, plaintiffs alleged an overcharge, and the verdict of the jury was for its amount and interest.

Two other contentions are made: (1) The court should have charged the jury that the burden was on the plaintiffs to show that the rates on their shipments were excessive and unreasonable. (2) The court erred in permitting plaintiffs to amend their complaint so as to set up a new cause of action.

(1) If there was error in this its effect is not appreciable. The record shows a most painstaking trial of the case on the part of counsel and the court, a full exposition of all of the elements of judgment and careful instructions of the court for their estimate. It would be going very far to reverse a case upon the effect of the bare abstraction asserted by the contention, even granting it could be sustained.

(2) Permitting the amendment of the complaint was not an abuse of the discretion which a court necessarily possesses.

The above are the main contentions of defendants. They make, besides, a contention comprehensive of all of the rulings against them; but to give a detailed review of such rulings would require a reproduction of the record, and we therefore only say that they have been given attention and no prejudicial error is discovered in them.

Judgment of the Circuit Court of Appeals is reversed and that of the Circuit Court is affirmed.